

WATER LAW OF SOUTH AFRICA 1912-1998

Report to the
Water Research Commission

by

Maritza Uys
BA, LLM (Stell)
Advocate of the Supreme Court of South Africa

WRC Report No KV 203/08
ISBN 978-1-77005-675-6

MARCH 2008

The publication of this report emanates from a project entitled *Water Law of South Africa 1912-1998* (WRC project number K8/683)

DISCLAIMER

This report has been reviewed by the Water Research Commission (WRC) and approved for publication. Approval does not signify that the contents necessarily reflect the views and policies of the WRC, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.

PREFACE BY MINISTER OF WATER AFFAIRS AND FORESTRY

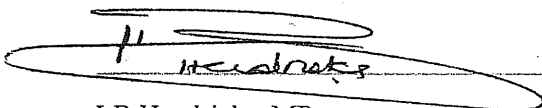
My fellow South Africans

This compendium reflects all the water court cases handled by the legal system in South Africa from 1912 to 1998. I consider this a valuable contribution from the Water Research Commission as being an outstanding knowledge dissemination initiative for the benefit of all the users. This compendium can be extremely useful for water professionals and legal practitioners around the country as well as those beyond South Africa's borders.

After more than a decade of our democracy, we continue to strive for equitable access to water and sanitation by all South Africans. Equity and redress are cornerstones in the National Water Act of 1998, which signals an end to any discrimination in allocations of water. To be able to rectify misgivings of the past, we need to be fully aware of the history and to learn from it. This publication seeks to create a historical perspective of water laws in South Africa and will be a vital resource to future planning scenarios.

I applaud the WRC and the author of this compendium, Advocate M Uys, for their foresight and I am sure that this publication will prove to be a valuable resource in seeking redress and equity in water allocations. I therefore present you with the vital ingredient that will reflect the epitome of the treasured tenet: some for all forever.

As the custodian of the country's water resources and myself hailing from the legal fraternity, I am sure, you will not only find this publication interesting, but also an invaluable reference guide for a brighter future.

A handwritten signature in black ink, appearing to read 'LB Hendricks', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

LB Hendricks, MP

Minister of Water Affairs and Forestry

TABLE OF CONTENTS

1	INTRODUCTION TO THIS REPORT	iii
2	INTRODUCTION TO THE ATTACHED CD	v
3	THIS REPORT	vii
4	ACKNOWLEDGEMENTS	viii
5	INTRODUCTION TO WATER LAW CASES	ix
6	WATER LAW CASES CHRONOLOGICAL LIST	xiii
7	TEXTS OF WATER LAW CASES: 1912-1998 (WLC 1-386)	1

1. INTRODUCTION TO THIS REPORT

This water law cases compendium is meant to fill the need for a legal source for use during the implementation of the National Water Act, 1998, and especially for purposes of determining existing lawful water uses, as defined in the Act. During the investigation for purposes of this research, it was realized that, although certain important water court judgements had been published before 1970, these publications did not provide adequate data for purposes of utilization for the various phases and processes of implementation of the Act, and that a more complete source was necessary, containing all water cases, and not only reportable ones ("reportable cases" being those which had been identified as materially contributing to the contents of the water law). The reason is that the justification for codification has changed: before the Act, judgements were firstly used by the affected parties to the cases to vest rights, and secondly to report cases of special importance for purposes of use by the judiciary in the interpretation of the water law.

Under the 1998 Act, however, a complete record of all water cases is required, to determine existing lawful water uses for purposes of the establishment of water use entitlements under the new Act, and also to understand the water law of the previous dispensation, to facilitate continuity of water use and water resource development and management.

It was also found that the majority of water court cases were decided before 1956, when water users relied heavily on the courts to establish and declare their water rights, mainly because the water law was a statutory system and not an administrative system. After the 1956 Act, the minister increased the assumption of control over water sources, by the declaration of government water control areas – in these areas, water rights were administratively allocated, which had a huge affect on the role of the water court to determine water rights.

The Department of Water Affairs and Forestry is in the process of finalizing the registration process under section 34 of the National Water Act of 1998, as well as the verification process. In order to verify existing lawful water uses, the department and its support practitioners will rely heavily on established rights, and will need legal sources to prove the existence thereof. After verification, the even more onerous task of compulsory licencing will follow which will once again rely heavily on historical water rights. A well-recorded case register and publication of judgements will form one of the most important sources of both these processes to make the era of equitable distribution of water entitlements in the quest for redress not only in the water but also in the land allocations in South Africa.

The work on compiling the water law cases started in 2004 by Dr Heather MacKay and is managed by E Karar from 2005 until this successful production. Since 2004, the author has put in tremendous amount of effort to make the product as simple and user friendly as possible and at the same time as informative as possible not only to the law practitioners but to all water users. Hence, the sources of water law should be easily accessible to everyone who has to research, apply or otherwise deal with any matter concerning water, such as The Minister of Water Affairs and Forestry, the staff of the Department of Water Affairs and Forestry, Water Consultants (Technical and Legal), Judges and Magistrates, the Water Tribunal Advocates, attorneys and other legal practitioners, the Department of Justice and its prosecuting authorities, bulk users of water (local authorities, industries and farmers), Water Management Institutions under the current water law and all other interested water scientists and engineers.

The Reason for the investment and the Scope thereof "Water law", for the purposes of this work, means every general South African rule of law concerning water. The Sources of the water law are to be found in CASE LAW, namely the judgments and orders of the supreme / high courts,

including the water courts; LEGISLATION, namely Acts of Parliament and the notices published under them; and LEGAL LITERATURE, namely books and articles which set out and explain the rules of our water law both common law and modern.

Due to the costly production costs, it was decided to publish the summary of all the court cases whilst capturing all the background support detailed sources in a compact disc which can be found attached to this report.

This report and supporting attached CD should be available to all South Africans free of charge. Proper acknowledgement to the holder of the copy right, the WRC should be made.



Eiman Karar

Director Water Resources Management
Water Research Commission
South Africa

2. THE CONTENTS OF THE ATTACHED CD

Part 1. Water Law Cases

Water courts were established by colonial legislation, consolidated in the Irrigation Act, 1912, and abolished by the National Water Act, 1998. From 1912 to 1969 a number of water court cases were reported in South Africa, but these reports have been out of print for many years. Other cases on water law are scattered over many law reports.

In 2004, I collected and edited the 1970-98 water court cases and other supreme court cases on water law, under the title WATER LAW OF SOUTH AFRICA 1970-98 (WRC Project No K8/544).

In 2006 I collected and edited the 1912-69 water court cases and other supreme court cases on water law under the title WATER LAW OF SOUTH AFRICA 1912-69 (WRC Project No K8/622).

In Part 1 of this work WATER LAW OF SOUTH AFRICA 1912-98 (WRC Project No K8/683), I reproduce all 386 water law cases which I could find and which seemed reportable to me.

Part 2. Water Legislation

Part 2 of this work contains the original texts of the two general water Acts which were current during the period, namely the Irrigation and Conservation of Waters Act 1912 (Act 8 of 1912), and the Water Act 1956 (Act 54 of 1956). The 1956 Act repealed the 1912 Act and the 1956 Act was in turn repealed by the National Water Act 1998 (Act 36 of 1998).

Part 2 also includes the texts of the Acts which amended the 1912 and 1956 Acts, and of the main regulations issued under those Acts.

From these texts, one can therefore reconstruct any provision in the Act and regulations as it was at any date in the past.

Part 3. Water Law Literature

It has been many decades since any publication was devoted exclusively to South African water law. Water law literature is now to be found only in general publications or as articles on selected topics in law journals.

Therefore Part 3 of this work lists the South African water law works published from 1912 to 1998, and also the water law works noted in water law cases.

Part 4. Indexes

The enormous quantity of data on water law produced from 1912 to 1998 most of which has now been collected in this work has to be properly indexed in order to be of use.

The indexes consist of Lists of Cases, Legislation and Literature Noted in Parts 1, 2 and 3 respectively, and a Subject Index concludes the work.

Many important topics have been expanded into mini-articles in the Subject Index. It therefore differs from usual subject indexes which are simply lists of words and sub-words with references, and is almost a Water Law Encyclopaedia.

3. THIS REPORT

Note that this work covers only the water law which was produced between 1912 and 1998. According to the subsidy conditions laid down by the Water Research Commission (WRC), two important parts of South African water law are not included in this work.

The first is the law prior to 1912. It becomes obvious that it is still important when one refers to the CASES Index, which shows that the courts extensively referred (and still refer) to pre-1912 cases, legislation and literature (including the common law). The pre-1912 sources are even more difficult to access than those produced after 1912, and their systematic collection and reproduction is much to be desired.

The second part of South African Water law which is not included in this work, is the post 1998 water law. For practical purposes it is the most important part of our water law because it is the current law: the National Water Act 1998 (Act 36 of 1998) and the Water Services Act 1997 (Act 108 of 1997) form the basis of our present water law.

It will therefore be ideal from a water law point of view if this work could be followed by the publication of a complete consolidated work WATER LAW OF SOUTH AFRICA, which will include not only the 1912-98 data hereby collected but also all the other sources of South African water law from the earliest time to the present.

Such a work will however be too large and the market is too small for it to be published commercially. The WRC made the funds available for the present work and its two predecessors, and it may hopefully also open the way for the above magnum opus on water law.

4. ACKNOWLEDGEMENTS

I thank the Water Research Commission for the grant which made this work possible. I also thank my father, Dr JF (Frikkie) Uys, for assisting me with the research, sub-editing and translations.

Maritza Uys

BA, LLM (Stell)

Advocate of the Supreme Court of South Africa

5. INTRODUCTION TO THE WATER LAW CASES

This Part contains the texts of the judgments in cases which dealt with South African water law. In these cases the judges sat either as “water courts” under the 1912 Irrigation Act and the 1956 Water Act or as ordinary supreme courts, and handed down reasoned judgments.

All the judgments delivered in the period 1912-1998 which, in my opinion, dealt with “water law” are included. “Water law” is concerned with persons’ rights to water and the concomitant duties of others. All cases dealing with the then current general Water Acts and the common law are therefore included.

But not every case having water as its subject can be regarded as a “water law case”. Because sometimes water is merely the incidental subject matter of a case but the subject could just as well have been anything else.

Cases are NOT included if the matters are wholly regulated by special laws such as the Rand Water Board Act, the different Irrigation Settlements Acts, and the provincial Acts (Ordinances) concerning the distribution of water by local authorities.

Order

The texts of the Water Law Cases (WLC) are in chronological order according to their judgment dates. They are numbered consecutively from the first judgment in 1912 to the last judgment in 1998, namely WLC 1 to WLC 386.

Note that “WLC ” refers to the CASE number which I allocated to each case and NOT to a PAGE number.

Citations

A case in this compilation is to be cited by reference to –

- (1) Its Judgment Year
- (2) This work’s Compiler (Uys),
- (3) The abbreviation WLC,
- (4) The WLC Number and
- (5) The Court.

For example: “Union Government v Zak River Estates Ltd 1918 Uys WLC 58 WC”.

The references to sources of the law (Cases, Legislation and Legal Literature) as cited by judges, have usually been changed to the standardised references developed by Fontes Juris. For example: the reference of a case which the judge cited as “Struben v Waterworks Co 9 SC 68”, will be changed to “Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68”.

Omissions from judgments

Parts of judgments dealing with matters not directly concerned with water law are omitted.

Also omitted are detailed evidence analyses and apportionments of water or of damages, if the issues and the water law principles involved can be grasped without such details.

Such omissions are indicated in notes between square brackets.

Alternative references

If a case was reported elsewhere, that reference is given in the NOTES preceding the text of each judgment.

Style

Punctuation has been modernised: abbreviation points are omitted; unsuitable punctuation was changed; and commas are retained only where really necessary.

Capitals: It used to be the fashion to commence the name of every institution and official title and even of documents with a capital letter; but we limit capitals mostly to personal and place names.

Length: Sentences and paragraphs are broken up if they are too long and involved.

Tautology: Unnecessary words once in fashion but now regarded as superfluous verbiage are omitted. For example: words which sound unnecessarily meek or deferential (for a judge), such as “learned” (when referring to a fellow-judge or an author), “I think”, “In my opinion”.

Stop-words such as “However”, “Now”, “Then”, “Well”, “Indeed” and “In fact” are omitted.

Dates are modernised: for instance “10 May 1912” for “the 10th May, 1912.”

Numbers: Spaces, commas or points within a number (except decimals) are omitted: for instance “10000 gallons”; and numbers in words are converted to figures when dealing with time, distance or quantity: for example “10 days/feet/cusecs”. Fractions of money amounts or surface areas such as “s.d.” (shillings and pence) and “square roods”, are omitted unless they are material to a judgment.

Paragraph Numbers: The paragraphs within a case are numbered, each being prefaced by the abbreviation “WLC ” followed by the case number with a separator point the whole being in a bold smaller type and square brackets. For example: [WLC 84.10].

The paragraph numbers serve as cross-references within the cases, and as Index references. They are therefore more accurate than the customary page references, and they remain constant in print or on CD.

The paragraph numbers also serve as hyperlinks in the CD-version of this work: every reference to a paragraph number is in the form of a hyperlink which, by clicking on it, will take you directly to that paragraph.

Regulations

When a judge refers to a regulation without specifying which set of regulations he is referring to we add, in square brackets, the year, the government notice number and the short title : for example “[1912 GN 982 r 10 (Principles to Guide Water Courts)]”. The regulation can then easily be found in the LEGISLATION part of this work.

The “Which” Rule: Our computer’s grammar checker regularly showed the word “which” as a grammatical error. It seems that the word is very popular with South African judges (and other

writers) – probably under the influence of the word “wat” in Afrikaans and Dutch. The following examples were collected from just a few paragraphs in a judgment (by an English-speaking judge):

- (a) The areas [which] we are concerned with here...
- (b) The apportionment [which] the court is asked to make...
- (c) Lands on L [which were] near the river...
- (d) Regulation 1, which is the governing regulation...
- (e) Land which is beneficially irrigable...
- (f) That portion [which forms] forming part of ...
- (g) The only properties [which need] needing to be considered...
- (h) The water of a spring [which fed] feeding the stream ...
- (i) A plea which is available ...

We took different steps to sidestep the grammar checker:

- (1) The word was regarded as unnecessary and was simply deleted – (a) and (b) above – sometimes with one or more words following it (c) above;
- (2) By inserting a comma before it in order to create a sub-sentence (d) and (e) above;
- (3) By converting the verb following it into a participle (f), (g) and (h) above.
- (4) And sometimes we were nonplussed by the computer’s grammar rule and just left it as it was - (i) above.

Translations

Afrikaans and Dutch (Nederlands) judgments were translated into English by Dr JF Uys. Other non-English abbreviations, quotations and expressions are usually translated.

English equivalents of Dutch words in the Irrigation Act 1912 and of Afrikaans words in the Water Act 1956, were not always consistent and it was sometimes difficult to decide which meaning a judge had in mind. The following are examples of water-related words often occurring in legislation and judgments and their Afrikaans equivalents. (The references in square brackets are examples of where the words appear in the Water Act 1956).

abstract	onttrek [s 30A(a)]; uithaal [s 1 “water work”]; neem [s 9(1)(b)]; uitneem [s 9A(1)]; verkry [s 27]; uitpomp
bed	bedding(s) [s 1 “public water”]
canal(s)	kanaal (kanale) [s 1 “water work”]
channel(s)	sloot (slote) [s 150(2)]; bedding(s) [s 1 “water work”]; kanaal (kanale) [s 110(1)(e)]
collect	vergaar
course(s)	loop (lope) [s 1 “public stream”]
dam wall	– see weir
diversion dam	uitkeerdam
drain(s)	afvoersloot (-slote) [s 141(5)]
flush	opslag [water which seeps to the surface]
furrow(s)	voor (vore) [s 1 “normal flow”]
hippo pool(s)	seekoeigat(e), zeekoegat(en)
impound(ment)	opdam(ming) [s 1 “water work”]
kloof(s)	kloof (klowe)
overflow	oorloop, oorvloei [water which flows over a weir and continues down the channel as a visible flow]

return seepage	sug [water which seeps back to the stream]
runoff	afloop [water which runs off irrigated land and flows back to the stream]
service dam	leidam [a dam in which a weak flow of water is stored in order to increase volume and pressure for more effective irrigation later]
sowing dam	saaidam, zaaidam [a shallow dam in which wheat is sown when the dam has sufficiently dried out]
store/storage	opgaar/opgaring [s 1 “water work”]
tributary	takstroom [s 9(1)(e)]; systroom
vlei	vlei
weir	damwal; dwarswal; keerwal; studam [s 1 “water work”]; stuwal; wal

Abbreviations

The following abbreviations are used in this Part:

AD	Appellate Division of the Supreme Court of SA
C	Cape Provincial Division of the Supreme Court of SA
Hall	GC HALL Decisions of the Water Courts of the Union of SA 1921-8
IB	Irrigation Board
Krummeck	CT KRUMMECK Decisions of the Water Courts of SA 1913-21
N	Natal Provincial Division of the Supreme Court of SA
NC	Northern Cape (Griqualand West) Provincial Division of the Supreme Court of SA
O	Orange Free State Provincial Division of the Supreme Court of SA
T	Transvaal Provincial Division of the Supreme Court of South Africa
Uys	WLC Maritza UYS Water Law Cases (in Water Law of South Africa 1912-98)
Vos	WJ VOS Decisions of the Water Courts of South Africa 1947-69
Watermeyer 1	HEP WATERMEYER Decisions of the Water Courts of SA Vol 1 1928-36
Watermeyer 2	HEP WATERMEYER Decisions of the Water Courts of SA Vol 2 1936-46
WCJ	Water Court Judge
WLC	Water Law Case number assigned to each case in Maritza UYS Water Law of South Africa 1912-98

6. Water Law Cases - Chronological List

1912 Uys WLC 1 O	Koffyfontein Estates Ltd v Havenga
1912 Uys WLC 2 C	Nel v Mellet
1912 Uys WLC 3 C	Worcester Municipality v Meiring
1912 Uys WLC 4 C	Du Plessis van Heerden
1912 Uys WLC 5 T	Herold v Berlin Mission Society
1912 Uys WLC 6 C	Louw v Union Government
1912 Uys WLC 7 T	Breyten Collieries Ltd v Dennil (1)
1912 Uys WLC 8 C	Gavin v Fourie
1912 Uys WLC 9 C	Le Roux v Du Plessis
1913 Uys WLC 10 C	Cilliers v Estate Viljoen
1913 Uys WLC 11 T	Breyten Collieries Ltd v Dennil (2)
1913 Uys WLC 12 C	Sapiero v Ferreira
1913 Uys WLC 13 C	Van der Merwe v McGregor
1913 Uys WLC 14 C	Bruwer v Bruwer
1913 Uys WLC 15 A	Ferreira v Sapiero
1913 Uys WLC 16 C	Van der Merwe v Zak River Estates Ltd
1913 Uys WLC 17 C	Smith v Smith (1)
1914 Uys WLC 18 WC	Sadien v Vosper
1914 Uys WLC 19 WC	Van Marseveen re Crocodile River
1914 Uys WLC 20 A	Van Heerden v Coetzee
1914 Uys WLC 21 WC	Biggs v Pretorius
1914 Uys WLC 22 A	Smith v Smith (2)
1914 Uys WLC 23 C	Van Heerden Bros v Scott Bros
1914 Uys WLC 24 WC	Pietpotgietersrust Municipality v Amm
1914 Uys WLC 25 WC	Reinstorf re Mozane Spruit
1914 Uys WLC 26 T	Buitendag, R v
1914 Uys WLC 27 WC	Holmes v Salzmann (1)
1914 Uys WLC 28 C	Van der Vyver v Conradie
1914 Uys WLC 29 E	Norton v Crooks
1914 Uys WLC 30 C	Van der Vyver v Marais
1915 Uys WLC 31 WC	Union Government re Mooi River (1)
1915 Uys WLC 32 WC	Union Government re Mooi River (2)
1915 Uys WLC 33 WC	Van der Westhuizen v Rabe
1915 Uys WLC 34 WC	Baroda IB v Collett
1915 Uys WLC 35 WC	Heavingham v Ohrigstad River Board
1915 Uys WLC 36 C	Van Heerden v Smit
1915 Uys WLC 37 WC	Butterworth Municipality re Gegcuana River
1915 Uys WLC 38 WC	Maggs re Moreleta Spruit
1915 Uys WLC 39 WC	Coetzee v Coetzee
1916 Uys WLC 40 WC	Rand Water Board re Vaal River
1916 Uys WLC 41 C	Touyz, R v
1916 Uys WLC 42 WC	Venter v De Villiers
1916 Uys WLC 43 A	New Heriot Gold Mining Co Ltd v Union Government
1916 Uys WLC 44 WC	Coxton v Bezuidenhout re Koster River
1917 Uys WLC 45 WC	Rand Mines Power Supply Co Ltd re Vaal River Barrage
1917 Uys WLC 46 WC	Kolver v Malan
1917 Uys WLC 47 WC	Du Plessis & De Villiers
1917 Uys WLC 48 A	Cape Town Council v Benning
1917 Uys WLC 49 WC	Molteno Municipality re Stormberg Spruit

1917 Uys WLC 50 WC	Mapochsgronden Streams
1917 Uys WLC 51 C	Aliwal North Municipality v Jeffares
1917 Uys WLC 52 WC	Chalmers v Theron
1917 Uys WLC 53 WC	Kirstein re Zendeling Spruit
1917 Uys WLC 54 WC	Tweefontein Colliery Ltd re Cession of Water Rights
1917 Uys WLC 55 WC	Van Dyk v Van Dyk
1917 Uys WLC 56 WC	Smartt Syndicate Ltd re Ongers River (1)
1918 Uys WLC 57 A	Van Marseveen v Union Government
1918 Uys WLC 58 WC	Union Government v Zak River Estates Ltd
1918 Uys WLC 59 WC	Grobler v Retief
1918 Uys WLC 60 WC	De Beer v Engelbrecht
1918 Uys WLC 61 WC	Klein Berg River (1)
1918 Uys WLC 62 WCSA	Rubber Manufacturing & Tyre Co Ltd re Umgeni River
1919 Uys WLC 63 W	Bishop v Humphries
1919 Uys WLC 64 WC	Jeffares v Aliwal North Municipality
1919 Uys WLC 65 WC	Klein Berg River (2)
1919 Uys WLC 66 C	Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd
1919 Uys WLC 67 WC	Smartt Syndicate Ltd v Richmond Municipality (1)
1920 Uys WLC 68 A	Union Government v Marais
1920 Uys WLC 69 O	Stephens v De Wet
1920 Uys WLC 70 WC	Van der Heever re Marico River
1920 Uys WLC 71 O	Kaffir River IB v Marais
1921 Uys WLC 72 O	Richter v Bloemfontein Town Council (1)
1921 Uys WLC 73 WC	Camphor re Hex River
1921 Uys WLC 74 WC	Nourse v Speck
1921 Uys WLC 75 WC	Cape Orchard Co Ltd v Conradie
1921 Uys WLC 76 WC	Albert Falls Power Co Ltd re Umgeni River
1921 Uys WLC 77 C	Smartt Syndicate Ltd v Certain Riparian Owners
1921 Uys WLC 78 C	Dorman v Louw
1921 Uys WLC 79 WC	Witbank Colliery Ltd re Olifants River
1921 Uys WLC 80 WC	Smartt Syndicate Ltd v Richmond Municipality (2)
1921 Uys WLC 81 WC	Glaeser v Warren
1921 Uys WLC 82 WC	Kaffir River IB v Wessels
1921 Uys WLC 83 WC	Witbank Municipality re Olifants River
1921 Uys WLC 84 WC	Bon Accord IB v Pretoria Municipality (1)
1921 Uys WLC 85 C	Union Government v Firth
1921 Uys WLC 86 WC	Bon Accord IB v Pretoria Municipality (2)
1921 Uys WLC 87 A	Richter v Bloemfontein Town Council (2)
1922 Uys WLC 88 WC	Poole's Bay Village MB v Mossel River Estates Co Ltd
1922 Uys WLC 89 WC	Bon Accord IB v Pretoria Municipality (3)
1922 Uys WLC 90 WC	Cape Portland Cement Co Ltd v Van Schalkwyk
1922 Uys WLC 91 A	African Realty Trust Ltd v Holmes
1922 Uys WLC 92 WC	Bon Accord IB re Aapies River
1922 Uys WLC 93 C	Firth v Union Government
1923 Uys WLC 94 T	Pretoria Municipality v Bon Accord IB
1923 Uys WLC 95 C	Kock v Registrar of Deeds
1923 Uys WLC 96 A	De Beer v Van der Merwe
1923 Uys WLC 97 WC	Lindley Municipality re Valsch River
1923 Uys WLC 98 WC	Glatthaar v Van Wyk (1)
1923 Uys WLC 99 WC	Jordaan v Black
1924 Uys WLC 100 WC	Van der Merwe v Hollins

1924 Uys WLC 101 WC	Sundays River IB v Van Rynevelds Pass IB
1924 Uys WLC 102 WC	Botha v Le Roux
1924 Uys WLC 103 C	Woeke v Calitzdorp IB
1924 Uys WLC 104 WC	Louw v Dorman
1925 Uys WLC 105 WC	Transvaal & SA Land Trust Ltd v Roux
1925 Uys WLC 106 WC	West End Farms & Ranch Co Ltd
1925 Uys WLC 107 WC	Nylstroom Village Council re Klein Nyl
1925 Uys WLC 108 WC	Nylstroom Village Council v Van Deventer
1925 Uys WLC 109 WC	Glatthaar v Van Wyk (2)
1925 Uys WLC 110 A	Smit v Motsepe
1925 Uys WLC 111 WC	Imperial Cold Storage & Supply Co Ltd v Kaplan
1925 Uys WLC 112 T	Glatthaar v Van Rensburg
1926 Uys WLC 113 C	De Wet v Vermeulen
1926 Uys WLC 114 WC	Stroh v Cellier
1926 Uys WLC 115 WC	Phillips v Muller
1926 Uys WLC 116 WC	Dutch Reformed Church of Redelinghuis v Roux
1926 Uys WLC 117 WC	De Wet v Estate Rossouw
1926 Uys WLC 118 E	Sundays River IB v Dunbrody Mission
1926 Uys WLC 119 T	Trakman v Withers & Bates
1926 Uys WLC 120 O	Holmes v Salzmann (2)
1926 Uys WLC 121 C	Herzenberg Mullne Ltd v Cape Town Council
1926 Uys WLC 122 T	Reid v Van der Merwe
1926 Uys WLC 123 T	Pretorius v Pretorius
1927 Uys WLC 124 A	Bulawayo Municipality v Roberts
1927 Uys WLC 125 WC	Great Fish River IB v Southey (1)
1927 Uys WLC 126 A	Union Government v Bolam
1927 Uys WLC 127 O	Lawrie v Holmes
1927 Uys WLC 128 C	De Wet v Deetlefs (1)
1927 Uys WLC 129 A	Garlick v Smartt (1)
1927 Uys WLC 130 WC	Ball v Erasmus
1927 Uys WLC 131 A	Garlick v Smartt (2)
1927 Uys WLC 132 A	Great Fish River IB v Southey (2)
1927 Uys WLC 133 WC	Potgieter v Bauscher
1928 Uys WLC 134 A	De Wet v Deetlefs (2)
1928 Uys WLC 135 T	Still, R v
1928 Uys WLC 136 C	Calitz v Lyle
1928 Uys WLC 137 WC	Natal Estates Ltd re Umgeni River
1928 Uys WLC 138 W	Rivas v Premier Transvaal Diamond Mining Co Ltd
1928 Uys WLC 139 T	New Consort Gold Mines Ltd v Kritzing (1)
1928 Uys WLC 140 O	Labuschagne v Steyn
1928 Uys WLC 141 WC	Great Fish River IB v Southey (3)
1929 Uys WLC 142 WC	Barberton Municipality v CT Andrews & Son Ltd
1929 Uys WLC 143 WC	Breed re Witpoort Spruit
1929 Uys WLC 144 WC	Eloff re Diversion
1929 Uys WLC 145 C	Truter v Raubenheimer
1929 Uys WLC 146 T	West Rand Main Reef v Brink
1929 Uys WLC 147 T	New Consort Gold Mines Ltd v Kritzing (2)
1929 Uys WLC 148 T	Joubert, R v
1930 Uys WLC 149 T	Middelburg IB v Julius Koenig's Estate
1929 Uys WLC 150 WC	Hereford IB v Pretorius
1930 Uys WLC 151 N	Bhika v Poliah

1930 Uys WLC 152 WC	Smartt Syndicate Ltd re Ongers River (2)
1930 Uys WLC 153 WC	Booyesen re Ongers River
1930 Uys WLC 154 O	Steyl v Upper Modder River IB
1930 Uys WLC 155 A	Wagenaar v Du Plessis (1)
1930 Uys WLC 156 E	Schultz v Somerset East Municipality
1930 Uys WLC 157 WC	Harty v Douglas
1931 Uys WLC 158 WC	Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality
1931 Uys WLC 159 WC	Hall & Sons Ltd re Gladdespruit
1931 Uys WLC 160 A	Pienaar v Treasure Trove Diamonds Ltd
1931 Uys WLC 161 T	Union Government v Chatwin
1931 Uys WLC 162 C	Smuts v Faure
1931 Uys WLC 163 WC	Wagenaar v Du Plessis (2)
1931 Uys WLC 164 T	Nel, R v
1931 Uys WLC 165 WC	Southern Life Association v Du Plessis
1931 Uys WLC 166 T	Harber, R v
1932 Uys WLC 167 WC	Allen v Tamsen
1932 Uys WLC 168 WC	Irvin re Steelpoort River
1932 Uys WLC 169 W	Prinsloo v Luipaardsvlei Estates & GM Co Ltd
1932 Uys WLC 170 WC	Taylor re Sabalele Stream
1932 Uys WLC 171 N	Varatha v Coronation Brick & Tile Co Ltd
1933 Uys WLC 172 E	Du Plessis Estates Ltd v SA Railways & Harbours
1933 Uys WLC 173 WC	Biggs re Sundays River
1933 Uys WLC 174 WC	Hemmingson re Waterkloof River
1933 Uys WLC 175 T	Geduld Pty Mines Ltd v New Springs Collieries
1933 Uys WLC 176 WC	Coetser re Spekboom River
1934 Uys WLC 177 WC	Kruger re Elandspruit
1934 Uys WLC 178 WC	Union Government v Moller
1934 Uys WLC 179 WC	Lower Dwars River River Board
1934 Uys WLC 180 WC	Stevenson re Visch Spruit
1934 Uys WLC 181 WC	De Souza re Spekboom River
1935 Uys WLC 182 WC	Van Heerden re Liefde-en-Vrede Spruit
1935 Uys WLC 183 T	Joubert v Espach
1935 Uys WLC 184 WC	Taute v Allers
1936 Uys WLC 185 WC	Sundays River IB v Parkes Bros (1)
1936 Uys WLC 186 WC	Somerset West Municipality & Cape Explosives Works Ltd
1936 Uys WLC 187 WC	Somerset West Municipality re Lourens River
1936 Uys WLC 188 C	Bosman, R v
1936 Uys WLC 189 A	Breede River (Robertson) IB v Brink
1936 Uys WLC 190 WC	Union Government v Friedman
1937 Uys WLC 191 WC	Louis Trichardt Town Council re Dorps River
1937 Uys WLC 192 C	Uys v Municipality of Heidelberg
1937 Uys WLC 193 C	Du Plessis v Philipstown Municipality
1937 Uys WLC 194 WC	Olivier v Meintjes (1)
1937 Uys WLC 195 C	White v Union Government
1937 Uys WLC 196 C	Olivier v Meintjes (2)
1938 Uys WLC 197 WC	Port Elizabeth Municipality re Kromme River
1938 Uys WLC 198 WC	Port Elizabeth Municipality v Potgieter
1938 Uys WLC 199 WC	Union Government re Modini Spruit
1938 Uys WLC 200 A	Sundays River IB v Parkes Bros (2)
1939 Uys WLC 201 WC	Green v Jooste
1940 Uys WLC 202 WC	Theunissen Municipality re Vet River

1941 Uys WLC 203 WC	Gronum v Rabone
1941 Uys WLC 204 WC	Barber v Scanlan IB
1942 Uys WLC 205 A	Union Government v Maile
1942 Uys WLC 206 WC	Chalkley re White River
1943 Uys WLC 207 A	De Villiers v Galloway
1943 Uys WLC 208 WC	Mynhardt v Union Government
1943 Uys WLC 209 WC	Van Tonder v Van Niekerk
1943 Uys WLC 210 T	Van der Lith v Alberts
1943 Uys WLC 211 C	Hugo v Page
1944 Uys WLC 212 WC	Searles Ltd re Great Brak River
1944 Uys WLC 213 WC	Pretorius v Estate Lategan
1944 Uys WLC 214 WC	Fram v Minister of Lands and Irrigation
1944 Uys WLC 215 WC	Bloemfontein Municipality v Wedderburn
1945 Uys WLC 216 C	Gorgens v Williams
1946 Uys WLC 217 WC	Frasers Ltd v Wepener Municipality
1946 Uys WLC 218 WC	Jooste v Van der Merwe
1946 Uys WLC 219 T	Van der Merwe v Fourie
1946 Uys WLC 220 A	Clydesdale (Tvl) Collieries Ltd v Witbank Municipality
1946 Uys WLC 221 C	Hough v Steenkamp
1947 Uys WLC 222 T	Tweedegeluk Edms Bpk v Howes
1947 Uys WLC 223 Z	Edmonds v Smith
1947 Uys WLC 224 WC	Transvaal Consolidated Land & Exploration Co Ltd v Escom
1947 Uys WLC 225 WC	Van den Berg v Karagornas
1948 Uys WLC 226 N	Johnsen, R v
1948 Uys WLC 227 C	Laubscher, R v
1948 Uys WLC 228 C	Minister of Irrigation re Vlekpoort River
1948 Uys WLC 229 T	Van Zyl, R v
1948 Uys WLC 230 C	Uys v Hoffman
1948 Uys WLC 231 WC	Struben v Certain Riparian Owners (1)
1948 Uys WLC 232 T	MacGregor v Beckenstrater (1)
1949 Uys WLC 233 WC	La Plaisante Fruit Farms v Imperial Cold Storage
1949 Uys WLC 234 WC	Colyn v De Wet
1949 Uys WLC 235 WC	Struben v Certain Riparian Owners (2)
1949 Uys WLC 236 C	Graaff-Reinet Municipality v Van Ryneveld's Pass IB (1)
1949 Uys WLC 237 WC	Gass v Escom
1949 Uys WLC 238 WC	MacGregor v Beckenstrater (2)
1950 Uys WLC 239 WC	Kroonstad Municipality v Maison & Edkins Pty Ltd
1950 Uys WLC 240 T	Sebastian v Malelane IB (1)
1950 Uys WLC 241 A	Graaff-Reinet Municipality v Van Ryneveld's Pass IB (2)
1950 Uys WLC 242 T	Bauchenss, R v
1950 Uys WLC 243 E	Haynes v King William's Town Municipality
1950 Uys WLC 244 T	Moll v Department of Irrigation
1950 Uys WLC 245 T	Ackerman v Fry
1950 Uys WLC 246 T	Beckenstrater v MacGregor
1951 Uys WLC 247 WC	Rabie v De Wet (1)
1951 Uys WLC 248 WC	Naude v Cloete
1951 Uys WLC 249 WC	Rabie v De Wet (2)
1952 Uys WLC 250 WC	SA Railways & Harbours v Thompson
1952 Uys WLC 251 WC	Rabie v Erasmus
1952 Uys WLC 252 T	Oosthuizen, R v
1952 Uys WLC 253 WC	Standerton Municipality re Vaal River

1952 Uys WLC 254 WC	Rabie v De Wet (3)
1952 Uys WLC 255 T	Sebastian v Malelane IB (2)
1952 Uys WLC 256 O	Erasmus v Union Government
1953 Uys WLC 257 WC	McQueen v Fram
1953 Uys WLC 258 WC	Nel v Joubert
1953 Uys WLC 259 WC	Scholtz v African Realty Trust Ltd
1953 Uys WLC 260 C	Kruth v Jan Fourieskraal IB
1954 Uys WLC 261 WC	Pietersburg Municipality re Tertiary Use
1954 Uys WLC 262 C	Clanwilliam Municipality v Braude
1954 Uys WLC 263 T	Jackson v Union Government
1954 Uys WLC 264 WC	De Wet & Seuns Bpk v Jordaan
1954 Uys WLC 265 WC	Uys v Joubert
1954 Uys WLC 266 A	Braude v Clanwilliam Municipality
1954 Uys WLC 267 WC	Plettenberg Bay Village MB re Keurbooms River
1955 Uys WLC 268 WC	Middelburg Municipality re Vaalbank Spruit
1955 Uys WLC 269 WC	Opperman v Great Fish River IB
1955 Uys WLC 270 T	Bothma v Kruger
1955 Uys WLC 271 E	Goosen v Kruger
1955 Uys WLC 272 Z	Barklie v Bridle
1956 Uys WLC 273 A	Union Government v Jackson
1956 Uys WLC 274 A	Thormahlen v Gouws
1956 Uys WLC 275 A	Germiston City Council v Chubb
1956 Uys WLC 276 A	Ellis v Laubscher
1956 Uys WLC 277 A	Minister of Lands v Pretorius
1957 Uys WLC 278 N	Van Niekerk v Du Toit
1957 Uys WLC 279 N	Wartburg Health Committee re Umkabela Stream
1957 Uys WLC 280 WC	Wartburg Health Committee v Smith
1957 Uys WLC 281 WC	Natal Tanning Co Ltd v Minister of Water Affairs
1957 Uys WLC 282 N	Feralloys Ltd v SA Native Trust
1957 Uys WLC 283 WC	Standerton Municipality v Smit
1957 Uys WLC 284 WC	Combrink v Rodeon Village Council
1958 Uys WLC 285 A	De Villiers v Barnard
1958 Uys WLC 286 WC	Joubert v Minister of Water Affairs
1958 Uys WLC 287 WC	Warmbaths Town council v Warmbaths IB
1958 Uys WLC 288 WC	Senekal Municipality re Sand River
1959 Uys WLC 289 A	Van der Merwe v Visagie
1959 Uys WLC 290 A	Minister of Water Affairs v Van Staden
1959 Uys WLC 291 W	Benoni Town Council v Meyer (1)
1959 Uys WLC 292 A	Union Government v Gass
1959 Uys WLC 293 WC	Van Staden v Minister of Water Affairs
1959 Uys WLC 294 WC	Tapasia v SA Native Trust
1960 Uys WLC 295 WC	Van Vuuren v Minister of Water Affairs
1960 Uys WLC 296 A	Kakamas Management Board v Louw
1960 Uys WLC 297 WC	SA Railways & Harbours v Van Niekerk
1960 Uys WLC 298 WC	SA Industrial Cellulose Corporation v Umkomaas Town Board
1960 Uys WLC 299 WC	Senekal v Minister of Water Affairs
1960 Uys WLC 300 WC	Blunt-Mackenzie v White River Valley Conservation Board
1961 Uys WLC 301 WC	Burger v Pretoria Portland Cement Co Ltd (1)
1961 Uys WLC 302 C	Vosloo, R v
1961 Uys WLC 303 WC	Burger v Pretoria Portland Cement Co Ltd (2)
1961 Uys WLC 304 WC	O'Okiep Copper Co Ltd v Union Government

1961 Uys WLC 305 W	Benoni Town Council v Meyer (2)
1961 Uys WLC 306 WC	Venables v Minister of Water Affairs
1962 Uys WLC 307 A	Du Toit v Ackerman
1962 Uys WLC 308 NC	Becker, S v
1962 Uys WLC 309 WC	Cronje v Minister of Water Affairs
1962 Uys WLC 310 WC	Urquhart v Minister of Water Affairs
1963 Uys WLC 311 T	Vlakplaats Estates Pty Ltd v Geral
1963 Uys WLC 312 A	Van Schalkwyk v Van der Wath
1963 Uys WLC 313 WC	Kitchener v SA Native Trust
1963 Uys WLC 314 WC	Human v Lourens
1964 Uys WLC 315 A	Minister of Water Affairs v Mostert (1)
1964 Uys WLC 316 A	SA Native Trust v Kitchener
1964 Uys WLC 317 T	Beckenstrater v Sand River IB (1)
1965 Uys WLC 318 WC	Ohrigstad IB v Slabbert
1966 Uys WLC 319 A	Minister of Water Affairs v Mostert (2)
1966 Uys WLC 320 A	Le Roux v Le Roux
1967 Uys WLC 321 WC	De Beers Consolidated Mines Ltd re Buffels River
1967 Uys WLC 322 WC	Viljoen v SA Railways and Harbours
1967 Uys WLC 323 A	Bester v Noord-Agter-Paarl IB
1968 Uys WLC 324 A	Grant v Stonestreet
1968 Uys WLC 325 A	Beckenstrater v Sand River IB (2)
1968 Uys WLC 326 WC	Fourie v Van Rhyn
1969 Uys WLC 327 WC	Ellis v Botha
1969 Uys WLC 328 A	Haviland Estates Pty Ltd v McMaster
1969 Uys WLC 329 A	Badenhorst v Chambers
1969 Uys WLC 330 WC	Mader v Minister of Water Affairs
1969 Uys WLC 331 WC	Louws Creek IB v Roux
1969 Uys WLC 332 WC	Von During v Minister of Water Affairs
1970 Uys WLC 333 C	Fullard, S v
1970 Uys WLC 334 WC	Consolidated Citrus Estates v Minister of Water Affairs
1970 Uys WLC 335 WC	Phalaborwa Water Board v Struwig
1970 Uys WLC 336 WC	Booyesen v Pieterse
1970 Uys WLC 337 A	Minister of Water Affairs v Von During
1971 Uys WLC 338 A	Pieterse v Du Plessis
1971 Uys WLC 339 Z	Dickinson v Minister of Water Development
1971 Uys WLC 340 WC	Du Toit v Krige
1971 Uys WLC 341 WC	Oosthuizen v Cronje
1972 Uys WLC 342 Z	Fourie v Marandellas Town Council
1972 Uys WLC 343 WC	De Kock v Minister of Water Affairs
1973 Uys WLC 344 C	Jordaan, S v
1973 Uys WLC 345 C	Daljosaphat IB v S Louria Pty Ltd
1973 Uys WLC 346 WC	Taute v Janse van Rensburg
1973 Uys WLC 347 T	Heyneke v Abercrombie
1974 Uys WLC 348 A	Buglers Post Pty Ltd v Secretary for Inland Revenue
1974 Uys WLC 349 C	Yanqua Middeldrift Edms Bpk v Aspoort IB
1974 Uys WLC 350 A	Van Rensburg v Taute
1974 Uys WLC 351 Z	Anglo-American Rhodesian Development Corp Ltd v Thetford Estates Pvt Ltd
1975 Uys WLC 352 Z	Verlander, S v
1975 Uys WLC 353 WC	Van der Vyver v Minister of Water Affairs
1975 Uys WLC 354 T	Redelinghuis v Bazzoni

1976 Uys WLC 355 A	Nel v Enyati Colliery Ltd
1977 Uys WLC 356 WC	Letaba Noordkanaal IB re Ownership of Works
1978 Uys WLC 357 N	Davey v Minister of Agriculture
1978 Uys WLC 358 WC	Havenga v Mare
1979 Uys WLC 359 T	Le Roux v Richter
1979 Uys WLC 360 WC	Weston v Minister of Water Affairs
1980 Uys WLC 361 C	Mathee v Lerm
1980 Uys WLC 362 NC	Stemmet v Department of Water Affairs
1980 Uys WLC 363 N	Wassung v Simmons
1980 Uys WLC 364 C	De Vries v Minister of Forestry
1980 Uys WLC 365 WC	Sneeusig Landgoed Edms Bpk
1984 Uys WLC 366 WC	Tecklenburg v Minister van Omgewingsake
1985 Uys WLC 367 WC	Le Roux v Kruger
1986 Uys WLC 368 O	GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality (1)
1986 Uys WLC 369 T	Transvaal Canoe Union v Butgereit
1986 Uys WLC 370 A	Kruger v Le Roux
1987 Uys WLC 371 WC	Minister of Water Affairs v Van der Berg
1987 Uys WLC 372 A	Butgereit v Transvaal Canoe Union
1988 Uys WLC 373 A	GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality (2)
1989 Uys WLC 374 C	Cogmanskloof IB v Land and Agricultural Bank of SA
1990 Uys WLC 375 N	Ixopo IB v Land & Agricultural Bank of SA
1990 Uys WLC 376 C	De Witt v Knierim (1)
1991 Uys WLC 377 A	Jansen van Vuuren v Van der Merwe
1991 Uys WLC 378 A	Land and Agricultural Bank of SA v Cogmanskloof IB
1993 Uys WLC 379 A	De Witt v Knierim (2)
1994 Uys WLC 380 WC	Minister of Water Affairs v Scheerpoort River Riparian Owners
1994 Uys WLC 381 T	AW Burman Holdings Pty Ltd v Great Letaba IB
1995 Uys WLC 382 W	Harris v Williams
1996 Uys WLC 383 O	Smuts v Minister of Water Affairs and Forestry
1998 Uys WLC 384 SEC	Low Water Properties Pty Ltd v Wahloo Sand CC
1998 Uys WLC 385 A	Williams v Harris
1998 Uys WLC 386 N	Feedmill Development Pty Ltd v Attorney-General of KwaZulu-Natal

7. TEXTS of Water Law Cases: 1912-98 (WLC 1- 386)

***Koffyfontein Estates Ltd v Havenga* 1912 Uys WLC 1 O**

[WLC 1 NOTES]

Judgment Date 1912-02-21. **Court** OPD. **Judge(s)** AFS MAASDORP (Chief Justice), D WARD

Also reported as *Koffyfontein Estates Ltd v Havenga* 1912 OPD 7

Quick-note

Servitude to use water in public stream – “for ordinary purposes” – meaning “as used when servitude granted” – in this case for domestic and cattle use – therefore not for irrigation.

Summary

In 1890 Koffyfontein Estates contracted with one Visagie, the owner of the farm Uitdraai on the Riet river, to dam the river at a certain place. The owner reserved the right to use as much water as he might require “for ordinary purposes on the farm and to erect a pump therefor”. At that time he used the water only for domestic purposes and for the watering of stock and a few fruit trees.

The company erected a dam with a capacity of 100 million gallons and diverted the water to its Koffyfontein Diamond Mine. When Havenga acquired the farm in 1910, he erected pumps with a capacity of 10000 gallons an hour and started to pump water from the river.

The company claimed a declaration of rights that it was entitled to all the stored water except such water as the owner might bona fide require for ordinary domestic purposes and the watering of stock on the farm and that the owner be interdicted from removing additional water from the river.

The owner denied that the servitude prevented him from taking water for irrigation and said that, in any case, he took only floodwater that ran over the weir.

Held: that the words “ordinary purposes” in the present context meant the purposes for which the water was used at the time when the contract was entered into and did not mean “reasonable use”; and that the company’s claim had therefore to be allowed.

Sources Noted

[No sources were noted in this judgment]

***Nel v Mellet* 1912 Uys WLC 2 C**

[WLC 2 NOTES]

Judgment Date 1912-04-12. **Court** CPD. **Judge(s)** CG MAASDORP (Judge President); MW SEARLE.

Also reported as *Nel v Mellet* 1912 CPD 195

Quick-note

Property owner, not occupier, may claim declaration of property’s water rights – occupier may claim interdict against infringement of property’s existing rights – owner of undivided share in property must join other owners.

Summary

(1) Plaintiff (P) alleged that his water rights in respect of 3 portions of the farm Buffels Vlei, Laingsburg, were being infringed and he claimed a declaration of rights and an interdict. Portions 1 and 2 were not registered in his name but he alleged that they were bequeathed to him subject to his mother’s life interest; that there was an informal agreement between him and his mother to occupy the land. He was the registered owner of an undivided one-ninth share of Portion 3 and he alleged an informal agreement with the other co-owners whereby he was entitled to occupy a certain part thereof (with its water rights).

(2) P claimed to be entitled to turns of the water in the Groot Klip river in respect of portions 1 and 3; to divert surplus water, during his turns of portion 1, on portions 2 and 3; to use on portions 2 and 3 the run-off (“afloop water”) which returns from the cultivated lands into the furrow.

(3) P set out the interference with his rights by defendant (D) and claimed a declaration of rights, an interdict, £500 damages and costs. D excepted as follows: (a) P is not the registered owner of portions 1 and 2 and is not entitled to sue for a declaration of rights in respect thereof; (b) P is not entitled to sue in respect of an undivided share of portion 3 without joining his co-owners; (c) P did not properly define the “turns” to which he claims to be entitled.

The court upheld D’s exceptions and gave P leave to amend his declaration.

Sources Noted

[No sources were noted in this judgment]

Worcester Municipality v Meiring 1912 Uys WLC 3 C

[WLC 3 NOTES]

Judgment Date 1912-05-28. **Court** CPD. **Judge(s)** MW SEARLE

Also reported as *Worcester Municipality v Meiring* 1912 CPD 421

Quick-note

An artificial furrow may become a natural stream in course of time.

Summary

The Worcester Municipality sued the owner of a portion of the farm Tweefontein in the Worcester district: (1) for an order declaring that defendant has no right to divert water from the 'municipal watercourse' out of the Hex river, (2) for a perpetual interdict restraining defendant from so diverting water and (3) for £500 damages sustained by his diversion of water.

HELD: The Municipality had not proved that the course of the stream was its private furrow: it could be one of the natural channels of the river, in which case the defendant as a riparian owner was entitled to its water; in any case he and his predecessors had used the water for very long without the Municipality objecting.

Sources Noted

Kohler v Baartman 1895 C (12 SC) 205 – WLC 03.17

Du Plessis v Van Heerden 1912 Uys WLC 4 C

[WLC 4 NOTES]

Judgment Date 1912-08-08. **Court** CPD. **Judge(s)** EJ BUCHANAN

Also reported as *Du Plessis vs Van Heerden* 1912 CPD 796

Quick-note

Interdict – dispute or claim as to water rights – jurisdiction of supreme court versus water court

Summary

The water from a fountain on H's farm flowed to P's farm for more than 30 years. P alleged that H obstructed the flow in several ways and also prevented P access to the fountain for the purpose of cleaning it. P claimed an interdict against H for interfering with P's water rights.

H objected that this was a "dispute or claim as to water rights" and that the supreme court had no jurisdiction ito s 34 of Act 8 of 1912.

Held that when damage is being done and an interdict is asked, the court's jurisdiction is not ousted. But on the evidence sufficient proof of harm was not proved and the interdict was refused with costs, the parties being advised to settle this trivial matter.

Sources Noted

1906 CAPE Act 32 s 68 – WLC 4.03

1912 Act 8 s 26(4) – WLC 4.02

1912 Act 8 s 32 – WLC 4.03

1912 Act 8 s 32(h) – WLC 4.02

1912 Act 8 s 34 – WLC 4.01

Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 4.03

VAN DER LINDEN *Institutes* [interdict] – WLC 4.06

Herold v Berlin Mission Society 1912 Uys WLC 5 T

[WLC 5 NOTES]

Judgment Date 1912-10-24. **Court** TPD. **Judge(s)** JW WESSELS, AW MASON, JS CURLEWIS

Also reported as *Herold vs Berlin Mission Society* 1912 TPD 879

Quick-note

Water court exceeding terms of reference – proceedings set aside

Summary

A water court was constituted (1) to decide whether the Klip river (Klerksdorp) was a public stream; if so, (2) to apportion the water between the portions of a certain riparian farm. The court concluded that the river was a public stream and that 60% of the water in the Klip river should go to H and the rest to other unnamed persons. H appealed to the TPD.

The respondent (B) objected to the late noting of the appeal but the court rejected it. [The parts of the judgments on this procedural point are not reproduced below]

On the merits, the court held that the water court complied with its reference (1), namely that the river was a public stream, but not with its reference (2), namely what share of the flow was to go to each farm portion; and that the water

court moreover decided matters which were not within its terms of reference, such as the right by prescription to a certain furrow and which land could best be irrigated.

The court therefore set aside the proceedings of the water court and the parties were allowed to proceed afresh under Act 8 of 1912, which had just then substituted the Transvaal Act under which the proceedings were commenced.

Sources Noted

1908 TRANSVAAL Act 27 s 53 (Irrigation) – WLC 5.01

1912 GN 491 (Special Water Court re Klip River) – WLC 5.01

***Louw v Union Government* 1912 Uys WLC 6 C**

[WLC 6 NOTES]

Judgment Date 1912-11-06. **Court** CPD. **Judge(s)** EJ BUCHANAN

Also reported as *Louw v Union Government (Minister of Lands)* 1912 CPD 1051

Quick-note

Dam to divert floodwater – servitude of abutment – flooding – damages

Summary

The Government gave notice under s 91 of Act 32 of 1906 of an application for a servitude of abutment on the farm T in order to construct a dam across the Zak river for the purpose of dividing the floodwaters of the river. Annexed to the notice was a plan showing the proposed work. The owner consented thereto and a servitude was duly registered. Thereafter the Government constructed a dam with spillways at such a level that after a flood the water was dammed back for a considerable time and flooded the grain lands and destroyed the crops of the plaintiff (the lessee of the farm).

Held, that as the defendant had no right to construct what was in effect a storage dam, the plaintiff was entitled to damages for the loss of his crops.

Sources Noted

1906 CAPE Act 32 s 91 (Irrigation) – WLC 6.05

McIntosh v Warrenton Village Management Board 1909 CPD 249 – WLC 6.09

***Breyten Collieries Ltd v Dennil (1)* 1912 Uys WLC 7 T**

[WLC 7 NOTES]

Judgment Date 1912-11-21. **Court** TPD. **Judge(s)** JW WESSELS, LS BRISTOWE.

Also reported as *Breyten Collieries Ltd v Dennill* 1912 TPD 1061 (spelt *Dennil* in 1913 TPD 261 [1913 Uys WLC 11 T], which spelling is maintained in this work)

Quick-Note

Private water – dispute relating to – jurisdiction of Supreme court

Summary

B had a lease on a farm giving it the sole right to search, mine and work for coal on the farm and to use the water on the farm for the purpose of the mining operations. The lease was entered into in 1909 between the farmer and M, who ceded it to B in 1910.

D owned the adjoining farm. On the boundary there was a natural pan that accumulated rainwater, with no outflow. A dispute arose between B and D as to how much water each could withdraw from the pan and B applied to the supreme court to settle the dispute.

D excepted that according to s 34 of the Irrigation Act 8 of 1912 only a water court had jurisdiction to hear such a dispute or claim.

HELD: That the water in the pan was private water and that Act 8 of 1912 applies only to public water; therefore s 34(1) of the Act does not take away the jurisdiction of the supreme court to determine questions relating to private water which does not adjoin or form part of a public stream. Exception therefore dismissed.

[As to the quantity of water that each side may extract from the pan, see WLC 11]

Sources Noted

1912 Act 8 s 8 – WLC 7.14, WLC 7.15, WLC 7.16, WLC 7.17, WLC 7.18, WLC 7.19

1912 Act 8 s 9 – WLC 7.09, WLC 7.10, WLC 7.11, WLC 7.12, WLC 7.13, WLC 7.14

1912 Act 8 s 34(1) – WLC 7.05, WLC 7.06

***Gavin v Fourie* 1912 Uys WLC 8 C**

[WLC 8 NOTES]

Judgment Date 1912-11-26. **Court** CPD. **Judge(s)** MW SEARLE

Also reported as *Gavin v Fourie* 1912 CPD 1122

Quick-note

Furrow turn – interference

Summary

The plaintiff (G) and the defendant (F) were registered owners of portions of a farm and were entitled, together with others, to turns of water-leading out of a certain furrow, taken out of a river. The turns out of this slood were regulated by an award of 1879 and by an agreement of 1908. G alleged that on a certain day, when it was his turn to divert water out of the furrow, F introduced water into the furrow from another river and via another furrow, causing an intermingling of waters of the two furrows. F then diverted a portion of the furrow. G denied that F, during G's turn of water-leading from the furrow, was entitled to use any portion of the furrow water, whether or not he introduced additional water into the furrow from another source. G therefore claimed an interdict against F.

F pleaded that, by virtue of certain agreements between riparian owners, he was entitled to water from the other river and that he necessarily had to divert it into the furrow on the day that G had the use of the water of that furrow, because it is a passage for the water of both rivers. Furthermore, that he diverted on to his land no more than the water to which he was entitled.

The evidence was taken at the Oudtshoorn circuit court and the case was then moved for argument to the Cape provincial division.

Sources Noted

VOET 8 6 5 – WLC 8.23

Le Roux v Du Plessis* 1912 Uys WLC 9 C*[WLC 9 NOTES]**

Judgment Date 1912-11-28. **Court** CPD. **Judge(s)** MW SEARLE

Also reported as *Le Roux and Others v Du Plessis* 1912 CPD 1140

Quick-note

Infringement of water rights – if rights based on award: supreme court has jurisdiction – if rights based on common law: only water court has jurisdiction

Summary

Plaintiff claimed a declaration of rights as to the water of the Grobbelaars river in the Division of Oudtshoorn. He and the defendant were owners of certain portions of the farm De Congo which were riparian to the river. He complained that by certain unlawful acts defendant had deprived him of rights conferred by an award which was made an order of court some years ago. As an alternative, he stated that the stream was public and that defendant was not in law entitled to make such use of the normal flow as to deprive plaintiff, as riparian owner, of all or a reasonable use of the water for primary and secondary uses; that defendant had deprived plaintiff of all water for such uses; that his acts of diversion were unlawful and constituted an unreasonable user; and that plaintiff had thereby suffered loss to his crops and was entitled to damages.

Defendant excepted to the declaration on the ground that (1) it relied on alleged common law or statutory rights but the award made the question of the rights of the parties *res judicata* and (2) the court had no jurisdiction to hear a water law question under the common law because the Irrigation Act of 1912, vested such jurisdiction solely in the water court.

The plaintiff had to amend his declaration to make it clear that he claimed under the award only and not under the common law and that his intention was merely to clarify points of the award which were not clear.

Sources Noted

1906 (Cape) Act 32 s 68 – WLC 9.01, WLC 9.07

1912 Act 8 s 34 – WLC 9.01, WLC 9.07

Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 9.06

Cilliers v Estate Viljoen* 1913 Uys WLC 10 C*[WLC 10 NOTES]**

Judgment Date 1913-03-20. **Court** CPD. **Judge(s)** EJ BUCHANAN; MW SEARLE

Also reported as *Cilliers v Estate Viljoen* 1913 CPD 156

Quick-note

Water rates are payable by seller of property

Summary

In March 1911 a water rate was assessed by the Doorn river irrigation board on a property within its irrigation district. It was payable in instalments, the last on 30 June 1912. The property was sold by public auction in April 1912. The conditions of sale provided for immediate possession of the property and transfer of the risk to the purchaser. In August 1912, in order to pass transfer, the seller paid the rates, which became due in June, and reclaimed the amount from the purchaser. The magistrate of Worcester allowed the claim.

On appeal, reversing the magistrate's decision, held that it was the seller's liability, as the owner of the property on the date when the rates were assessed, to pay the rates and that there was nothing in the conditions of sale to cast such liability on the purchaser.

Sources Noted

1906 (Cape) Act 32 (rates) – WLC 10.08
1912 Act 8 (rates) – WLC 10.02

Breyten Collieries Ltd v Dennil (2) 1913 Uys WLC 11 T

[WLC 11 NOTES]

Judgment Date 1913-05-05. **Court** TPD. **Judge(s)** JW WESSELS, AW MASON

Also reported as *Breyten Collieries Ltd. v Dennil* 1913 TPD 261

Quick-note

Boundary between properties traversing a pan – each owner may use all the water in the pan on his side of the boundary

Summary

The boundary line of two adjoining farms divided a pan, where rainwater collected. Four-fifths of the water lay on one farm and one-fifth on the other. Plaintiffs claimed that they were entitled to 4/5 of the water in the pan and alleged that the defendant by means of a furrow was leading off more water than he was entitled to. Defendant denied plaintiff's right to 4/5 of the water in the pan and stated that he was entitled to lead water for farming purposes out of the pan according to the natural flow thereof. In the alternative, that he was entitled to use half of the water in the pan by prescriptive right.

HELD: Either owner could use the water lying on his farm, even if such user might drain all the water in the pan.

HELD: Either owner could use the water in a reasonable manner for the improvement of his property.

[An exception to the supreme court's jurisdiction was dismissed – see WLC 7]

Sources Noted

Chasemore v Richards 1859 7 HL 349 – WLC 11.28
Fleming v Liesbeek Municipality 1884-5 C 268 – WLC 11.25
Struben v Cape Town District Waterworks Co 1891-2 C (9SC) 68 – WLC 11.28
Bradford (Mayor of) v Pickles 1895 AC 587 – WLC 11.28
BRUNNEMAN *ad D* 10 3 19 pr – WLC 11.26
BRUNNEMAN *ad D* 39 3 1 4 – WLC 11.28
BRUNNEMAN *ad D* 39 3 21 – WLC 11.28
CUJACIUS *ad D* 10 3 19 – WLC 11.24
D 10 1 13 – WLC 11.27
D 10 3 19 – WLC 11.16
D 10 3 4 1 – WLC 11.24
D 10 3 4 19 – WLC 11.24
D 17 2 83 – WLC 11.17
D 39 3 1 12 – WLC 11.28
D 39 3 1 15 – WLC 11.28
D 41 1 7 13 – WLC 11.24
FABER *ad D* 17 2 83 – WLC 11.17
GALE *Easements* ed 6 s 302-6 – WLC 11.24
GROENEWEGEN *Leg Abr ad C* 3 39 9 – WLC 11.27
GROENEWEGEN *Leg Abr ad D* 39 3 1 12 – WLC 11.28
HULOT & BERTHELOT tr D 10 3 19 – WLC 11.16
INSTITUTES 2 1 31 – WLC 11.24
MAASDORP *Institutes of Cape Law* 2 102 – WLC 11.28
MAASDORP *Institutes of Cape Law* 2 48, 97 – WLC 11.25
MONRO *ad D* 10 3 19 – WLC 11.24
MONRO *ad D* 17 2 83 – WLC 11.17, WLC 11.24
POTHIER *ad D* 17 2 83 – WLC 11.17
POTHIER *Contrat de Société Appendix* 230, 235, 242 – WLC 11.27
POTHIER *Contrat de Société Appendix* 236 – WLC 11.28
SINTENIS tr D 10 3 19 – WLC 11.16
VINNIUS *ad Inst* 2 1 31 – WLC 11.24
VOET 10 1 12 – WLC 11.27
VOET 10 3 5 – WLC 11.24
VOET 39 3 4 – WLC 11.28
VOET 41 1 25 – WLC 11.24

***Sapiero v Ferreira* 1913 Uys WLC 12 C**

[WLC 12 NOTES]

Judgment Date 1913-06-13. **Court** CPD. **Judge(s)** WM HOPLEY, JJ KOTZÉ

Also reported as *Shapiero v Ferreira and Others* 1913 CPD 475 [spelt *Sapiero* in this judgment (and in the earlier case, *Sapiero v Ferreira* 1906 CPD 84), which spelling is maintained in this work]

Quick-note

Servitude of aqueduct – Furrow insufficient for needs – Water court has no jurisdiction to vary

Summary

An 18-foot wide servitude of aqueduct over the land of S was created by agreements between the owners of land riparian to the Olifants river, Oudtshoorn district. F alleged that the existing furrow was insufficient for the purpose for which it was required and applied to a water court constituted under Act 32 of 1906 (Cape) to amend the servitude by increasing the space on either side thereof. The water court overruled exceptions to its jurisdiction and granted the application.

On appeal, held that a water court had no power to interfere with or vary the agreement by which the servitude was constituted and altered the order of the water court to one refusing the application.

Sources Noted

1906 CAPE Act 32 s 65 (Irrigation) – WLC 12.12
1906 CAPE Act 32 s 67(b) (Irrigation) – WLC 12.13, WLC 12.18, WLC 12.30, WLC 12.31
1906 CAPE Act 32 s 85 (Irrigation) – WLC 12.30
1906 CAPE Act 32 s 86 (Irrigation) – WLC 12.06, WLC 12.26, WLC 12.29
1906 CAPE Act 32 s 87 (Irrigation) – WLC 12.26, WLC 12.29, WLC 12.30
1906 CAPE Act 32 s 91 (Irrigation) – WLC 12.08, WLC 12.26
1906 CAPE Act 32 s 102 (Irrigation) – WLC 12.29
1910 Act 5 s 13(2)(e) – WLC 12.12
1912 Act 8 s 27 – WLC 12.12
1912 Act 8 s 28 – WLC 12.12
1912 Act 8 s 32(b) – WLC 12.18, WLC 12.20, WLC 12.31, WLC 12.32
1912 Act 8 s 86 – WLC 12.15
1912 Act 8 s 87 – WLC 12.16
1912 Act 8 s 103 – WLC 12.19
1912 Act 8 s 103(1) – WLC 12.29
1912 Act 8 s 141 – WLC 12.10, WLC 12.11
1912 Act 8 Schedule – WLC 12.25
Sapiero v Ferreira 1906 C 84; 1906 16 CTR 229 – WLC 12.05
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 12.13

***Van der Merwe v McGregor* 1913 Uys WLC 13 C**

[WLC 13 NOTES]

Judgment Date 1913-06-16. **Court** CPD. **Judge(s)** JG KOTZÉ, MW SEARLE

Also reported as *Van der Merwe v McGregor* 1913 CPD 497

Quick-note

Stream silting up due to human intervention – has to be artificially opened annually – retains character as a perennial stream.

Summary

The water of a river splits at point A and forms a side stream (misnamed a “tributary”). At point B on the side stream a furrow diverts water to M’s farm. Both points A and B are on V’s farm which lies higher than M’s farm. M complained to a water court that V blocked the side stream at A and the furrow at B and he claimed an order to restrain V and a servitude of aqueduct and abutment, and damages.

V’s defence was that M has no right to the water of the side stream because it is not perennial: it silts up every year at A.

The water court found that the side stream used to be a perennial stream and that the silting started 15 years ago when the divisional council temporarily blocked the side stream at A. It held that even though the side stream must now be opened annually, it retains its character as a perennial stream. It therefore granted M’s application for a restraint and servitudes of aqueduct and abutment, M to pay compensation for the servitudes. The damages claim was not pressed by M. Each party to pay his own costs..

On appeal by V: the CPD saw no reason to disturb the findings of the water court. But it reversed the costs order, granting costs to the substantially successful party (M).

Sources Noted

McGregor v Divisional Council of Clanwilliam 1898 C (8 CTR) 389 – WLC 13.07

***Bruwer v Bruwer* 1913 Uys WLC 14 C**

[WLC 14 NOTES]

Judgment Date 1913-07-30. **Court** CPD. **Judge(s)** EJ BUCHANAN

Also reported as *Bruwer v Bruwer* 1913 CPD 599

Quick-note

Servitude of aqueduct – construction of furrow before negotiations finalised – interdict

Summary

The owner of a riparian farm (applicant) desired to irrigate his non-riparian farm but the furrow would have to go over respondent's farm. Negotiations for a servitude of aqueduct took place between the parties but an agreement was not finalised. Applicant nevertheless proceeded to construct a furrow and, when respondent objected, applied ex parte and obtained a rule nisi, operating as an interdict to restrain the respondent from interfering with the use of the furrow, pending an action to be instituted by applicant in a water court under s 102 of Act 8 of 1912.

Respondent then applied to have the rule nisi and interdict set aside,

Held, that the interim interdict should be set aside with costs because the applicant had not instituted the proceedings in the water court (which were a condition of the rule nisi) and in any case had not established a clear right to a servitude of aqueduct.

Sources Noted

1912 Act 8 s 101 – WLC 14.09

***Ferreira v Sapiero* 1913 Uys WLC 15 A**

[WLC 15 NOTES]

Judgment Date 1913-10-08. **Court** AD. **Judge(s)** JH de VILLIERS (Chief Justice of South Africa); W SOLOMON (Judge of Appeal); J de VILLIERS (Judge President CPD; Additional Judge of Appeal), AFS MAASDORP (Chief Justice OFS; Additional Judge of Appeal); EJ BUCHANAN (Acting Judge of Appeal)

Also reported as *Ferreira and Others, Appellants v Sapiero, Respondent* 1913 AD 455

Quick-note

Aqueduct – widening of furrow – jurisdiction of water court to authorize widening – legal proceedings under repealed Act

Summary

A furrow from a dam led over several properties and mutual servitudes were registered. When the furrow washed away, there was a dispute about its reconstruction, some owners wanting the furrow not only to be repaired but also widened because it was in any case insufficient to cope with their irrigation requirements.

On 29 June 1912 the matter was taken to the water court under Cape Act 32 of 1906 but that Act was repealed 2 days later by the Irrigation Act 8 of 1912. The water court nevertheless granted the requested application for widening the furrow.

S appealed to the CPD, which allowed the appeal on the ground that the servitude was created by an agreement and that the water court had no jurisdiction to amend it [see WLC 12].

F applied to the AD for permission to appeal to the AD against the CPD decision. DE VILLIERS CJ held on 31 July 1913: "The water court may be considered as an inferior court, from which an appeal lies to the provincial division [of the supreme court], and under s 105 of the South Africa Act leave may be granted to appeal to the appellate division. Sufficient ground has been made out to justify the grant of such leave, and the court will grant the application." (SOLOMON JA agreed). This short judgment was reported in 1913 AD at p 318. [The "South Africa Act" referred to, was a British Act (1909 c 9), which then served as the constitution of the Union of South Africa].

The AD held that, with reference to s 13 of the Interpretation of Laws Act 5 of 1910, a new water court need not have been constituted under the new Act. But that the water court in any case exceeded its powers by ordering a widening of the furrow and its banks, because s 103(1) of the new Act gives the water court power to enlarge an existing irrigation work but the old Act contained no such provision. Appeal accordingly dismissed.

Sources Noted

1906 CAPE Act 32 s 67(b) – WLC 15.22, WLC 15.31

1906 CAPE Act 32 s 86 – WLC 15.12, WLC 15.26, WLC 15.28, WLC 15.31, WLC 15.43, WLC 15.46, WLC 15.50

1906 CAPE Act 32 s 87 – WLC 15.15, WLC 15.21, WLC 15.30, WLC 15.31

1906 CAPE Act 32 s 87(1) – WLC 15.13, WLC 15.36, WLC 15.37, WLC 15.45

1906 CAPE Act 32 s 91 – WLC 15.06

1906 CAPE Act 32 s 92 – WLC 15.21, WLC 15.30

1906 CAPE Act 32 s 92(1) – WLC 15.43

1906 CAPE Act 32 s 93 – WLC 15.16, WLC 15.20, WLC 15.21, WLC 15.39, WLC 15.41

1906 CAPE Act 32 s 96 – WLC 15.16, WLC 15.17, WLC 15.18, WLC 15.20, WLC 15.21, WLC 15.39, WLC 15.41

1910 Act 5 s 13 – WLC 15.10

1912 Act 8 s 103(1) – WLC 15.47

***Van der Merwe v Zak River Estates Ltd* 1913 Uys WLC 16 C**

[WLC 16 NOTES]

Judgment Date 1913-12-30. **Court** CPD. **Judge(s)** MW SEARLE

Also reported as *Van der Merwe v Zak River Estates Ltd* 1913 CPD 1053

Quick-note

Floodwater – upper owner’s dam breaking, causing lower owner’s dam to break – Negligence – changing natural flow of water.

Summary

A dam on Z’s land was fed by water diverted to it from a river in which Z had built an earthen weir (called a “sand block”). After heavy rain the weir and dam broke and the water inundated M’s dam, which in turn broke, causing damage.

M claimed damages on the ground of negligence: that Z’s construction of the dam and weir had changed or increased the natural flow of rain water, that it was defective and that Z failed to take proper steps when the emergency arose. The court granted an estimated amount of damages.

Sources Noted

1912 Act 8 s 14 – WLC 16.93

1912 Act 8 s 15 – WLC 16.93

Eastern Telegraph Co v Cape Town Tramways 1900 C 95 – WLC 16.80

Kohne v Harris 1899 C 144 – WLC 16.88

Ludolph v Wegner 1888-9 C 193 – WLC 16.83, WLC 16.94

Newman v East London Town Council 1895 C 61 – WLC 16.77

R v Trafford 1831 1 B & Ad 887 KB, 109 ER 1011 – WLC 16.89

FARNHAM *Law of Waters* 2490, 3875 – WLC 16.87

GROTIUS 2 35 17 – WLC 16.85

VOET 39 3 2 3 – WLC 16.85

***Smith v Smith (1)* 1913 Uys WLC 17 C**

[WLC 17 NOTES]

Judgment Date 1913. **Court** CPD. **Judge(s)** WM HOPLEY

Also reported in *Smith v Smith* 1914 AD 257 on p 257-267 [where the CPD judgement of HOPLEY J was published as an addendum to the AD judgment]

Quick-note

(1) Servitude to use existing dam on upper riparian property and to maintain it – rebuilding weir to hold water more effectively – whether breach of servitude.

(2) Owner may sink borehole on own property even if thereby reducing flow of underground water to neighbour.

Summary

(1) D had had a servitude right to use the water from a dam on the upper riparian property of P. The agreement was that D would maintain the weir, which was a primitive construction of sand and sods which leaked and regularly washed away. D then rebuilt the weir with mortar and stone.

P claimed that it was a breach of the agreement to repair the weir with other materials than sand and sods and that the effect was that less water leaked down the stream to P’s own dam lower down the stream. He applied for an interdict and damages.

The CPD held that D had not done anything wrong or unreasonable and refused the application.

(2) D sunk a borehole on his property which had the effect that it diminished the flow of a nearby fountain on P’s property. P claimed an interdict and damages.

Held: D was within his rights to bore where he did; that no malicious intent or foreknowledge was proved to intercept underground water on its way to the fountain. Application refused.

[The decisions on both points were confirmed by the AD – see *Smith v Smith (2)* 1914 Uys WLC 22 A below]

Sources Noted

De Bruijn v Louw 1905 O 11 – WLC 17.37

Snijman v Boshoff 1905 O 1 – WLC 17.37

Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 17.36

***Sadien v Vosper* 1914 Uys WLC 18 WC**

[WLC 18 NOTES]

Judgment Date 1914-02-23. **Court** WC (Wynberg). **Judge(s)** JER de VILLIERS (Water Court Judge)

Also reported as *Sadien v Vosper* Krummeck 1

Quick-note

Invasion by water causing injury to land - Division of private water rights

Summary

A landowner is liable in damages if by any means other than by the natural user of his land he causes water to invade his neighbour's land which would not naturally have invaded it and if damage is done by such water; and the liability exists whether the water invades the neighbour's land by passing over the surface of the ground or by percolating beneath the surface and whether the water in question be rain water or other water such as spring water.

By "natural user" is meant only such operations as are reasonably necessary for the enjoyment of the land

Sources Noted

Austen Bros v Standard Diamond Mining Co Ltd 1882 NC (1 HCG) 363 – WLC 18.35
Bank of Africa v Levin 1884-5 NC (3 HCG) 245 – WLC 18.35
Broder v Saillard 1876 2 Ch 692, 45 LJ Ch 414 – WLC 18.33
Cooper v Barber 1700 9 Fountainhall 99 (Scotland) – WLC 18.33
Hurdman v North Eastern Railway Co 1878 3 CPD 168, 1878 47 LJ 370 – WLC 18.33
Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 18.40
Reed v de Beer's Consolidated Mines 1891-2 C (9 SC) 333 – WLC 18.35
Steyn v Zeeman 1903 C (20 SC) 221 – WLC 18.40
Victoria Diamond Mining Co v De Beer's Mining Co 1880-4 A (1 BAC) 300 – WLC 18.35
D 39 3 1 3 – WLC 18.38
D 39 3 1 4 – WLC 18.38
D 39 3 1 5 – WLC 18.38
D 39 3 3 2 – WLC 18.34
D 39 3 3 pr – WLC 18.34
D 43 8 5 (?) – WLC 18.34
FARNHAM *Law of Waters* 982 – WLC 18.32
VOET 39 3 2+ – WLC 18.34

***Van Marseveen re Crocodile River* 1914 Uys WLC 19 WC**

[WLC 19 NOTES]

Judgment Date 1914-03-10. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Ex Parte Marseveen* Krummeck 10

Quick-note

Tertiary Use – Normal flow – Defined quantity

Summary

Application for permission to use normal flow for tertiary uses.

A water court may grant a defined quantity of normal flow for tertiary uses and all the water of the stream available at the proposed intake.

Sources

1912 Act 8 Chapter 7(b) – WLC 19.06
1912 Act 8 s 21 – WLC 19.02, WLC 19.03, WLC 19.05, WLC 19.07
1912 GN 982 r 44 (Principles to Guide Water Courts) – WLC 19.05
1912 GN 982 r 45 (Principles to Guide Water Courts) – WLC 19.05
1912 GN 982 r 46 (Principles to Guide Water Courts) – WLC 19.05

***Van Heerden v Coetzee* 1914 Uys WLC 20 A**

[WLC 20 NOTES]

Judgment Date 1914-03-11. **Court** AD. **Judge(s)** JH de VILLIERS (Chief Justice); J ROSE-INNES, CG

MAASDORP, J de VILLIERS, JC DOVE WILSON (Judges of Appeal)

Also reported as *Van Heerden v Coetzee* 1914 AD 167

Quick-note

Servitude of aqueduct – owner may not rebuild dam at a different place

Summary

The word "dam," when used in South Africa in reference to an accumulation of water caused by the damming up of a stream, is applied indiscriminately to the weir which holds back the water and to the body of water thus held back.

D, having a servitude of aqueduct over A's farm, had discarded the original dam erected in terms of his servitude right, and erected another bank or weir higher up the sprui, alleged that he was legally entitled to move the dam.

Held: the owner of the dominant tenement may not increase or improve his supply of water by a departure from the special terms in which the servitude was granted.

Held: D's contention that his action held no prejudice for A, is not valid, as prejudice is not relevant where the terms of the agreement are clear and specifically prohibits changes to the dam.

Sources Noted

D 8 3 15 – WLC 20.05
VOET 8 4 16 – WLC 20.05

***Biggs v Pretorius* 1914 Uys WLC 21 WC**

[WLC 21 NOTES]

Judgment Date 1914-04-09. **Court** WC (Middelburg, Cape). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Biggs v Pretorius* Krummeck 12

Quick-note

Interdict – injury to stream by willow trees – servitude of aqueduct

Summary

D planted willows on the banks of a stream, which reduced the water in the stream to which A was entitled. A applied for a declaration of rights.

D was ordered to remove the trees and was interdicted from further planting.

Sources Noted

O'Reilly v Lucke 1885-6 C (4 SC) 103 – WLC 21.20

MAASDORP *Institutes of Cape Law* [using aqueduct] – WLC 21.36

VOET 8 3 6 – WLC 21.36

***Smith v Smith (2)* 1914 Uys WLC 22 A**

[WLC 22 NOTES]

Judgment Date 1914-04-25. **Court** AD. **Judge(s)** JH de VILLIERS (Chief Justice), J ROSE-INNES, CG

MAASDORP (Judges of Appeal)

Also reported as *Smith v Smith* 1914 AD 257

Quick-note

(1) Dam in river used by lower riparian owner – agreement that user to maintain dam – rebuilding primitive weir to let less water flow down – whether breach of agreement

(2) Borehole reducing underground flow to neighbour – no intention to injure – not unlawful

Summary

(1) A riparian owner (D) had the use of a dam which was built on the upper property of P. It was built with soil and sods and leaked substantially and was often washed away. He thereupon rebuilt the dam with better materials, thereby letting less water flow down the river to P's dam. P claimed that it was a breach of the contract to rebuild with other material, although the contract was silent on this. The CPD dismissed the claim. The AD dismissed P's appeal.

(2) D sank a borehole on his property, thereby reducing the flow of underground water to P's fountain. The CPD held that it was not unlawful and the AD agreed.

[For the CPD judgment, see WLC 17 above]

Sources Noted

Van Heerden v Coetzee 1914 Uys WLC 20 A – WLC 22.05

***Van Heerden Bros v Scott Bros* 1914 Uys WLC 23 C**

[WLC 23 NOTES]

Judgment Date 1914-04-30. **Court** CPD. **Judge(s)** WM HOPLEY, MW SEARLE

Also reported as *Van Heerden Bros v Scott Bros* 1914 CPD 319

Quick-note

Disputed water rights – supreme court, not water court, to interpret servitude agreement

Summary

A servitude agreement between riparian farm owners provided which owners were to use the water of a certain fountain and which owners were allowed to construct one dam each in the stream. Originally the whole stream was perennial, but 25 years later only one section was still perennial. Owner S wanted to extract water from this section and applied to the water court to apportion the water of the river between the riparian owners of that section.

Owner H excepted to the jurisdiction of the water court on the ground that the water rights of the parties are defined by the servitude. The court overruled the exception because it did not regard the servitude as an apportionment and it therefore proceeded to apportion the water. S appealed to the CPD.

Held: That if the interpretation of a water agreement is necessary to determine the water rights of parties, the supreme court and not a water court has jurisdiction.

Sources Noted

1906 CAPE Act 32 s 67(a) – WLC 23.08

1906 CAPE Act 32 s 67(b) – WLC 23.07, WLC 23.08

1912 Act 8 s 32(a) – WLC 23.01, WLC 23.08

1912 Act 8 s 32(b) – WLC 23.01, WLC 23.07, WLC 23.10

1912 Act 8 s 32(h) – WLC 23.01, WLC 23.02

1912 GN 1692(1) Form 4 Water Court Rules – WLC 23.01

1912 GN 1692(1) Form 12 Water Court Rules – WLC 23.02
1912 GN 1692(1) r 36 Water Court Rules – WLC 23.01
1912 GN 1692(1) r 53 Water Court Rules – WLC 23.02
Ferreira v Sapiero 1913 Uys WLC 15 A – WLC 23.08
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 23.07, WLC 23.08, WLC 23.14

***Pietpotgietersrust Municipality v Amm* 1914 Uys WLC 24 WC**

[WLC 24 NOTES]

Judgment Date 1914-04-30. **Court** CPD. **Judge(s)** WM HOPLEY, MW SEARLE

Judgment Date 1914-05-22. **Court** WC (Pietpotgietersrust). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Ex parte Pietpotgietersrust Municipality* Krummeck 19

Quick-note

Water rising on land – secondary use by upper owner – Award for primary use

Summary

Application for definition and apportionment of water.

A public stream which disappeared under the ground to reappear again later is deemed to rise at its source and not where it reappears, and therefore the owner of the land where it reappears does not vest private water rights (exclusive use and enjoyment) in respect thereof.

Secondary use is a reasonable share of the water of a stream similar to the rights of lower riparian owners, and an owner may not take the entire flow after primary needs have been allowed.

Sources Noted

1852 TRANSVAAL Volksraad Resolution of 18 March art 8 – WLC 24.48, WLC 24.50, WLC 24.52
1852 TRANSVAAL Volksraad Resolution of 18 March art 13 – WLC 24.44
1886 TRANSVAAL Law 8 – WLC 24.45
1904 TRANSVAAL Ord 13 – WLC 24.84
1908 TRANSVAAL Act 27 s 46(5) – WLC 24.75
1908 TRANSVAAL Act 27 s 46(6) – WLC 24.73, WLC 24.75
1912 Act 8 s 2 “public stream” – WLC 24.18
1912 Act 8 s 8 – WLC 24.43, WLC 24.47
1912 Act 8 s 8(1) – WLC 24.21
1912 Act 8 s 11(2) – WLC 24.59
1912 Act 8 s 11(5) – WLC 24.67, WLC 24.68, WLC 24.69, WLC 24.74
1912 Act 8 s 11(6) – WLC 24.75
1912 Act 8 s 12 – WLC 24.68, WLC 24.70
1912 Act 8 s 26(1) – WLC 24.41
1912 Act 8 s 32(b) – WLC 24.01
1912 Act 8 s 109(3) – WLC 24.59
1912 GN 982 (Principles to Guide Water Courts) – WLC 24.71
1912 GN 982 r 3 (Principles to Guide Water Courts) – WLC 24.68
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 24.76, WLC 24.77, WLC 24.78, WLC 24.79, WLC 24.80, WLC 24.90, WLC 24.92, WLC 24.97, WLC 24.98
1912 TRANSVAAL Ord 9 s 71(14)(a) – WLC 24.86
1912 TRANSVAAL Ord 9 s 71(31) – WLC 24.84, WLC 24.85
Dudden v Guardians of Clutton Union 1856 1 H & N 627 – WLC 24.35
Hiscock v De Wet 1880-4 A (1 BAC) 35 – WLC 24.42
Mouton v Van der Merwe 1876 C (6 Buch) 18 – WLC 24.35
Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 24.52
Vermaak v Palmer 1876 C (6 Buch) 25 – WLC 24.35, WLC 24.40
MAXWELL *Interpretation of Statutes* ed 5 p 83 – WLC 24.71
MAXWELL *Interpretation of Statutes* ed 5 p 132 – WLC 24.74

***Reinstorf re Mozane Spruit* 1914 Uys WLC 25 WC**

[WLC 25 NOTES]

Judgment Date 1914-05-29. **Court** WC (Piet Retief). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Ex parte Reinstorf* Krummeck 42

Quick-note

Apportionment application unopposed – applicant’s onus of proof

Summary

Application for definition and apportionment of water.

Riparian owners who have an interest in an application for diversion of water cannot be compelled to attend the hearings, but should do so in their own interest. In their absence the applicant has to present sufficient prima facie factual evidence

Sources Noted

1912 Act 8 s 32(b) – WLC 25.34
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 25.18, WLC 25.35

***Buitendag, R v* 1914 Uys WLC 26 T**

[WLC 26 NOTES]

Judgment Date 1914-06-22. **Court** TPD. **Judge(s)** J de VILLIERS (Judge President); JS CURLEWIS

Also reported as *Rex v Buitendag* 1914 TPD 360

Quick-note

Secondary use of water of public stream – offence of depriving lower owners of water for primary use

Summary

B was charged that he, as an upper owner, had committed an offence by using the water of a public stream for irrigation, thereby depriving a lower owner of water for domestic and animal use.

HELD: The State had not proved the facts.

Sources Noted

1912 Act 8 s 11(5) – WLC 26.01, WLC 26.02

1912 Act 8 s 133(2) – WLC 26.02

***Holmes v Saltzmann* 1914 Uys WLC 27 WC**

[WLC 27 NOTES]

Judgment Date 1914-09-14. **Court** WC (Bloemfontein). **Judge(s)** JER de VILLIERS (Water Court Judge)

Also reported as *Holmes v Saltzmann* Krummeck 47

Quick-note

Servitudes – Good faith – Compensation for submersion under servitude of storage

Summary

Applications for servitudes of aqueduct, abutment and storage

The mere fact that a person applies for a servitude over a neighbour's farm to irrigate a portion of his land before he has exhausted the sources on his own farm which can be used to irrigate another part of the farm, does not necessarily indicate a lack of good faith, although it could be considered as a possible element to consider in determining good faith

When determining compensation for a servitude of aqueduct, abutment and storage, the court may consider not only the submerged area, but also the effects of floods as well as elements such as inconvenience, danger for livestock and other risks and losses.

Sources Noted

1912 Act 8 s 15 – WLC 27.09

1912 Act 8 s 110(1)(e)(ii) – WLC 27.11

1912 Act 8 s 101 – WLC 27.15

1912 GN 1692(1) r 48 (Water Court Rules) – WLC 27.29

1912 GN 1692(1) r 52 (Water Court Rules) – WLC 27.29

1912 GN 1692(1) Form 10 (Water Court Rules) – WLC 27.29

1912 GN 1692(1) Form 11 (Water Court Rules) – WLC 27.30

***Van der Vyver v Conradie* 1914 Uys WLC 28 C**

[WLC 28 NOTES]

Judgment Date 1914-09-17. **Court** CPD. **Judge(s)** MW SEARLE, FG GARDINER

Also reported as *Van der Vyver v Conradie* 1914 CPD 1040

Quick-note

Riparian owners agreed on diversion of water from dam – irrigation board constituted – board and some parties to agreement denied that they were bound by agreement – owner deprived of water claiming damages and interdict against irrigation board and owners jointly – exceptions of misjoinder, vagueness, etc

Summary

On a certain section of the Hex river there were 3 dams. The riparian owners agreed that all the summer water in the river would be stored in the upper dam, from which the water would be diverted by furrows and pipes to all the properties. But the winter water would be allowed to flow down the river “as usual” (*op de oude manier*).

The lower owners (V) alleged that, since the agreement was entered into, an irrigation board was constituted which constructed works above the upper dam and that its members were using all the water in summer and winter, so that the 2 lower dams received nothing. V claimed against the board and the upper owners (C) an order that: C are bound by the agreement, the interpretation of the agreement, an interdict, damages and apportionment of the water amongst the riparian owners.

The board excepted on the ground that it cannot be joined in an action for damages which arose before it came into existence; other defendants excepted on grounds of misjoinder, that no cause of action was disclosed; and that the damages were caused by predecessors.

Exceptions allowed. But an irrigation board may be joined in matters concerning the distribution of water in its area.

Sources Noted

1908 TRANSVAAL Act 27 – WLC 28.03

1912 Act 8 s 29(2) – WLC 28.06

1912 Act 8 s 97 – WLC 28.03

Zuser v Lewinsohn & Baumann 1914 CPD 697 – WLC 28.01

***Norton v Crooks* 1914 Uys WLC 29 E**

[WLC 29 NOTES]

Judgment Date 1914-11-27. **Court** EDL. **Judge(s)** TL GRAHAM (Judge President), AJ MCGREGOR

Also reported as *Norton v Crooks* 1914 EDL 532

Quick-note

Water flooding over a river weir – causing erosion on neighbouring farm – whether builder of weir or present owner liable for damages.

Summary

When C acquired his farm there was a low weir in the stream. Floodwater passed over and around the ends of the weir and flowed down the natural channel of the stream. In 1913 he increased the height of and lengthened the weir. The result was that floodwater was diverted on to N's farm causing a fountain to silt up, erosion, and damage to a wire fence. P claimed damages.

C's defence was that the weir was erected by his predecessor in title under an agreement with N's predecessor with the object of diverting the floodwater on to the land at the sides of the spruit. C denied that he raised or lengthened the weir: he had merely built a dam on the side of the weir furthest away from P's farm. He said that the erosion was caused naturally as a result of silting up behind the weir.

N applied to amend his declaration to the effect that C was negligent in not preventing the damage. Application refused for the reason that it would introduce a new cause of action, namely that C was liable for his predecessor's actions in constructing the weir.

Sources Noted

Van der Merwe v Zak River Estates Ltd 1913 Uys WLC 16 C – WLC 29.23, WLC 29.24

MAASDORP *Institutes* 2 126 – WLC 29.24

NATHAN *Common Law of SA* 1 pp 486-7 – WLC 29.13

VOET 39 3 2 – WLC 29.24

***Van der Vyver v Marais* 1914 Uys WLC 30 C**

[WLC 30 NOTES]

Judgment Date 1914-12-11. **Court** CPD. **Judge(s)** MW SEARLE

Also reported as *Van der Vyver & Another v Marais* 1914 CPD 1050

Quick-note

Riparian owner using water of stream on non-riparian farm – lower owner's rights – interdict – jurisdiction of supreme or water court

Summary

V and M are riparian owners on the Norree river which is a public and perennial stream. V was the lower owner. As such, each was entitled to a reasonable use of the water of the Norree river for irrigation. When M constructed a furrow to lead Norree river water from his riparian farm to his non-riparian farm (L), V applied for an interdict.

M pleaded (1) that the supreme court has no jurisdiction on the ground that the action involves a dispute concerning the use and diversion of water and that, by Act 8 of 1912, such a case should be determined by a water court; and (2) that any action arising out of the use of the water from the Norree river should not have been brought against him but against the Norree Irrigation Board because it controls the water of the Norree river and also supplies water to farm L.

V replied that the parties had in effect consented to the jurisdiction of the supreme court. Also, that a water court did not have jurisdiction to grant an interdict.

Held: That the alleged consent to the jurisdiction was not proved; also, that a water court could grant an interdict in certain circumstances. Application of V therefore dismissed, with leave to prove consent to jurisdiction in another suit.

Sources Noted

1906 CAPE Act 32 s 67(a) – WLC 30.07, WLC 30.08, WLC 30.19

1906 CAPE Act 32 s 67(b) – WLC 30.07, WLC 30.08

1906 CAPE Act 32 s 68 – WLC 30.08

1912 Act 8 s 32 – WLC 30.07, WLC 30.08

1912 Act 8 s 32(h) – WLC 30.11

1912 Act 8 s 34 – WLC 30.03, WLC 30.05, WLC 30.07, WLC 30.08, WLC 30.18

De Wet v Worcester Municipality 1911 CPD 394 – WLC 30.16

Du Plessis v Van Heerden 1912 Uys WLC 4 C – WLC 30.10

Union Government re Mooi River (1) 1915 Uys WLC 31 WC

[WLC 31 NOTES]

Judgment Date 1915-02-19. **Court** WC (Potchefstroom). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Ex parte Mooi River* Krummeck 56

Quick-Note

Apportionment – factors to be taken into account – loss by evaporation and seepage from furrows – additional supply from riparian owner's dam

Summary

This was an interlocutory application to interpret the meaning of r 8 and r 9(iv) and 9(v) of the Irrigation Regulations Part 2 under Act 8 of 1912 – which were guidelines to determine reasonable use by riparian owners of the normal flow of a public stream. The judgment was delivered on the same day as the judgment in the main application for the apportionment of the water of the whole Mooi river – see WLC 32 below.

Held: In an apportionment the court will make an allowance for the unavoidable loss by evaporation and absorption in the furrows.

Held: Surplus water stored by a riparian proprietor in a dam is to be regarded in an apportionment as an “additional supply” within the meaning of r 8.

Sources Noted

1912 GN 982 r 8 (Principles to Guide Water Courts) – WLC 31.04

1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 31.01, WLC 31.02

Union Government re Mooi River (2) 1915 Uys WLC 32 WC

[WLC 32 NOTES]

Judgment Date 1915-02-19. **Court** WC (Potchefstroom). **Judge(s)**: C JEPPE (Water Court Judge)

Also reported as *Ex parte Union Government* Vos 1

Quick-note

Determination of water rights of whole river system – principles of apportionment

Summary

The Government applied to the water court for the determination of its water rights in respect of its riparian farms on the Mooi river and for an apportionment of the normal flow. Consequently the rights of all 600 riparian owners in the river system had to be determined. Before making an apportionment of the pro rata share of each property, the following preliminary points were decided:

- The water court has jurisdiction even if rights were previously determined by agreement, prescription, judgment or arbitration, or even if some owners objected;
- it was not the water court's duty to determine the places and measures of water diversion:
- for rights acquired by prescription, the quantities extracted for 30 years had to be proved;
- an artificial watercourse may become a natural one;
- apportionment may be according to natural sections of the river;
- water apportionments were based on considerations such as: whether it is cultivated or cultivable land; other available water sources; flow distances; whether needed for primary, secondary, urban or rural use
- servitudes were not overridden by apportionments
- storage dams for surplus water should not affect apportionments
- wasting was prohibited, such as faulty furrows, over-irrigation or leading water into veld
- no order as to costs was made because the decision benefited all owners.

Sources Noted

1906 CAPE Act 32 s 68(b) – WLC 32.19

1912 Act 8 s 2 “owner” – WLC 32.02

1912 Act 8 s 10(3) – WLC 32.135

1912 Act 8 s 11(2) – WLC 32.79

1912 Act 8 s 13 – WLC 32.144

1912 Act 8 s 14 – WLC 32.144

1912 Act 8 s 18 – WLC 32.145

1912 Act 8 s 32(b) – WLC 32.10, WLC 32.16, WLC 32.18, WLC 32.19, WLC 32.23, WLC 32.31, WLC 32.32, WLC 32.34, WLC 32.173

1912 Act 8 s 32(g) – WLC 32.33, WLC 32.34, WLC 32.45

1912 Act 8 s 45(1)(g) – WLC 32.25

1912 Act 8 s 45(2) – WLC 32.25

1912 Act 8 s 62(a) – WLC 32.15, WLC 32.16

1912 Act 8 s 109 – WLC 32.131

1912 GN 1692(1) r 73 (Water Court Rules) – WLC 32.03

1912 GN 1692(1) r 74 (Water Court Rules) – WLC 32.03
 1912 GN 982 (Principles to Guide Water Courts) – WLC 32.116, WLC 32.25
 1912 GN 982 r 1 (Principles to Guide Water Courts) – WLC 32.26
 1912 GN 982 r 2(b) (Principles to Guide Water Courts) – WLC 32.27
 1912 GN 982 r 5 (Principles to Guide Water Courts) – WLC 32.28, WLC 32.34, WLC 32.70
 1912 GN 982 r 6(4) (Principles to Guide Water Courts) – WLC 32.119
 1912 GN 982 r 6(5) (Principles to Guide Water Courts) – WLC 32.118
 1912 GN 982 r 8 (Principles to Guide Water Courts) – WLC 32.148
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 32.136
 1912 GN 982 r 9(i) (Principles to Guide Water Courts) – WLC 32.78
 1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 32.121
 1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 32.147
 1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 32.168
 1912 GN 982 r 21 (Principles to Guide Water Courts) – WLC 32.29
 1912 GN 982 r 35 (Principles to Guide Water Courts) – WLC 32.29
 1913 Proc 69 – WLC 32.115
De Klerk v Niehaus 1897 C (14 SC) 302 – WLC 32.58
Ferreira v Sapiero 1913 Uys WLC 15 A – WLC 32.24
Kohler v Baartman 1895 C (12 SC) 205 – WLC 32.58
Le Roux v Du Plessis 1912 Uys WLC 9 C – WLC 32.20
Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 32.75
Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 32.74
Nel v Kleinhans 1905 C (22 SC) 50, 1905 C (15 CTR) 120 – WLC 32.58
Sapiero v Ferreira 1913 Uys WLC 12 C – WLC 32.23, WLC 32.26
Van Heerden Bros v Scott Bros 1914 Uys WLC 23 C – WLC 32.21, WLC 32.26
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 32.19, WLC 32.26
 ANGELL *Water Courses* 2 26 – WLC 32.70
 BURGE *Colonial Law* 3 26 – WLC 32.70
 JUTA *Water Rights* 54-5 – WLC 32.48
 MAASDORP *Institutes of Cape Law* 2 207 – WLC 32.70
 MAASDORP *Institutes of Cape Law* 2 81 – WLC 32.48

***Van der Westhuizen v Rabe* 1915 Uys WLC 33 WC**

[WLC 33 NOTES]

Judgment Date 1915-02-24. **Court** WC (Robertson). **Judge(s)** JER de VILLIERS.

Also reported as *Van der Westhuizen v Rabe* Krummeck 58

Quick-Note

Right to water of public stream – acquisition by prescription – proof of adverse user, time and quantity – interruption: what is and what is not – 1912's Act 8 s 32(b)

Summary

Application for definition of water rights and apportionment of river water.

For a prescriptive right to divert water out of a public stream (in excess of riparian owner's reasonable share) it is not necessary to prove that he diverted the whole flow at all seasons of the year: only that he diverted the whole "dry weather flow" or the flow apart from abnormal increases from time to time caused by floods. It is also possible to acquire by prescription the right to divert a definite quantity consisting of both persistent flow and flood flow or of either, for instance a right to divert at all times the whole flow of a stream up to 4 cusecs.

The tests for the acquisition of a water right by prescription include –

- (1) Alternating or intermittent user for 30 years;
- (2) It should be clear that adverse rights are being claimed or exercised against lower owners;
- (3) The systematical diversion of a fixed or a minimum quantity;
- (4) Use on alternate days or during alternate weeks for 30 years;
- (5) That any periods of non-use were not legal "interruptions" of prescription, such as –
 - (a) alternating or intermittent use;
 - (b) cessation of use occasioned by adverse interference on the part of the owner of the servient property;
 - (c) periodical abandonment of the use without the intention of losing the possession or quasi-possession of the water right, such as heavy rains having rendered irrigation unnecessary or injurious.
- (6) It is interruption if an upper and a lower riparian farm are owned by the same person, the use of even the whole of a public stream on the upper farm can found no prescriptive rights. But if the upper farm is owned by A and the lower farm by A and B in undivided equal shares and A has for 30 years used all the water on the upper farm openly, adversely, etc, the riparian rights attaching to A's half share of the lower farm would subsist but B's rights would be extinguished.

Held as to costs: In applications for the definition of water rights under s 32(b) costs are normally awarded against all the parties (including parties in default). Only in special circumstances are costs against only one party. For instance if he makes extravagant claims; is not bona fide; unnecessarily denies a claim; makes an unnecessary application; or requires a definition merely for some private purposes.

Sources Noted

1912 Act 8 s 32(b) – WLC 33.76
1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 33.72
Beaston v Weake 1855 5 E & B 986 – WLC 33.62
De Klerk v Niehaus 1897 C (14 SC) 302 – WLC 33.45, WLC 33.58, WLC 33.61
Du Toit v Potgieter 1898 C (8 CTR) 467 – WLC 33.29, WLC 33.68
Meyer v Johannesburg Waterworks Co 1893 T (H) 1 – WLC 33.42
Monmouthshire Canal Co v Harford 1847 1 CM & H at 631 – WLC 33.62
Nel v Kleinhans 1905 C (22 SC) 50 – WLC 33.45
Schulz, R v 1896 C (13 SC) 197 – WLC 33.53
Rossouw v Burgers 1880-2 C (1 SC) 119 – WLC 33.55
Union Government re Mooi River (2) 1915 Uys WLC 32 WC – WLC 33.76
Van Schalkwyk v Hauman 1897 C (14 SC) 214 – WLC 33.68
ANGELL *Watercourses* 210-11 – WLC 33.41
ANGELL *Watercourses* 224 – WLC 33.62
D 43 20 5 pr – WLC 33.59
D 43 20 5 1 – WLC 33.59
GALE *Easements* ed 7 p 104 – WLC 33.41
GALE *Easements* ed 7 p 165 – WLC 33.62
GODDARD *Easements* ed 5 p 252, 255 – WLC 33.55
GODDARD *Easements* ed 5 p 256 – WLC 33.26
GODDARD *Easements* ed 5 p 204, 327 – WLC 33.62
HALSBURY *Laws of England* 11 p 527 – WLC 33.56
MAASDORP *AFS Institutes of Cape Law* Vol 2 ed 2 p 215-6 – WLC 33.58
VOET 8 3 6 – WLC 33.59
VOET 8 3 7 – WLC 33.53
VOET 8 6 2 – WLC 33.35
VOET 8 6 9 – WLC 33.60
VOET 41 3 16 – WLC 33.52

***Baroda Irrigation Board v Collett* 1915 Uys WLC 34 WC**

[WLC 34 NOTES]

Judgment Date 1915-03-26. **Court** WC. **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *Baroda Irrigation Board v Collett* Krummeck 77

Quick-Note

Servitude of storage – compensation offered – servient owner failing to supply information - costs

Summary

Application for servitude

If a person who claims a servitude offers less compensation than the court eventually grants, the court will order the claimant to pay the costs of the application, unless the servient owner failed to give information as to his losses and damages resulting from the servitude.

Sources Noted

1912 Act 8 Chapter 7 – WLC 34.01

***Heavingham v Ohrigstad River Board* 1915 Uys WLC 35 WC**

[WLC 35 NOTES]

Judgment Date 1915-04-05. **Court** WC (Lydenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Heavingham v The River Board of the Ohrigstad River* Krummeck 77

Quick-Note

River board decision as to water works – damages – costs

Summary

A river board allowed certain alterations in respect of its water works on application by some members, but it seemed that resulting damages to other members could be prevented by the construction of a weir in the stream.

The board allowed the alterations before the dam was completed resulting in damage to downstream members, who applied to the water court against the river board order

The application was granted because the board allowed the alterations prematurely.

Sources Noted

1912 Act 8 s 32(a) – WLC 35.09, WLC 35.11
1912 Act 8 s 63 – WLC 35.09, WLC 35.12, WLC 35.94
1912 Act 8 s 76(2) – WLC 35.19
1912 Act 8 s 133(1)(c) – WLC 35.84
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 35.99, WLC 35.100
1912 GN 1692(1) r 36 (Water Court Rules) – WLC 35.11
1912 GN 1692(1) Form 4 (Water Court Rules) – WLC 35.11

***Van Heerden v Smit* 1915 Uys WLC 36 C**

[WLC 36 NOTES]

Judgment Date 1915-04-15. **Court** CPD. **Judge(s)** HH JUTA (Judge President).

Also reported as *Van Heerden and Another v Smit* 1915 CPD 177

Quick-Note

Jurisdiction: Water court or supreme court – determination and protection of water rights based on agreement, award or prescription

Summary

A farm in the district of Middelburg, Cape, was owned in undivided shares by X and S. In 1875 they agreed by notarial deed that they were entitled to equal shares of the water in a weir in a river on the farm. The water in the weir came mainly via a channel (sloop) on the farm, a fountain in the river and seepage. Some years later the farm was divided and though the transfer deeds made no provision as to the division of the water, the notarial agreement remained of full force and effect. Arbitrators later determined that the parties were to take their respective shares of the water in alternate weeks. Thereafter plaintiff (V) acquired X's farm together with the above water rights.

V now alleged that S sank boreholes near the channel, made a deep trench in the channel and made certain other works which diminished the quantity of water to which V was entitled. V then claimed in the supreme court a declaration as to his rights on the ground of the above notarial agreement and the arbitrators' award or, in the alternative, on the ground of prescription; and V further claimed an order against S to remove all his works and an interdict to restrain him in future and damages and costs.

S excepted to the jurisdiction of the supreme court on the ground that s 34 of Act 8 of 1912 gave exclusive jurisdiction to the water court to judge a dispute about water rights unless the parties consented to its hearing by the supreme court and that S did not give such consent.

Held, that the supreme court has no jurisdiction on the prescription claim and that the exception should be upheld, notwithstanding the claim on the award.

Sources Noted

1906 CAPE Act 30 s 67 – WLC 36.04, WLC 36.11

1908 TRANSVAAL Act 27 – WLC 36.13

1909 CAPE Act 27 (Irrigation Amendment) – WLC 36.13

1909 TRANSVAAL Act 7 (Irrigation Amendment) – WLC 36.13

1912 Act 8 s 32 – WLC 36.23

1912 Act 8 s 32(a) – WLC 36.02, WLC 36.04, WLC 36.05, WLC 36.11, WLC 36.14

1912 Act 8 s 32(b) – WLC 36.02, WLC 36.04, WLC 36.07, WLC 36.08, WLC 36.10, WLC 36.11, WLC 36.14, WLC 36.15, WLC 36.17, WLC 36.22

1912 Act 8 s 34 – WLC 36.02

1912 Act 8 s 45 – WLC 36.15

Le Roux v Du Plessis 1912 Uys WLC 9 C – WLC 36.21

Van Heerden Bros v Scott Bros 1914 Uys WLC 23 C – WLC 36.20

Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 36.11, WLC 36.16

***Butterworth Municipality re Gegcuana River* 1915 Uys WLC 37 WC**

[WLC 37 NOTES]

Judgment Date 1915-05-11. **Court** WC (Butterworth). **Judge(s):** JER de VILLIERS (Water Court Judge)

Also reported as *Ex parte Butterworth Municipality* Krummeck 96

Quick-note

Subdivision of riparian crown land for township – private water rights

Summary

Application for definition and apportionment of private water rights

A village was laid out on a subdivision of a piece of riparian crown land, but the erven did not abut on the public stream. The municipality applied for definition and apportionment of water, but the court held that the erven were non-riparian and that the water apportioned to the land could not be used on the erven, as this would be unreasonable use.

Sources Noted

1912 Act 8 s 32(c) – WLC 37.08, WLC 37.10

Maggs re Moreleta Spruit 1915 Uys WLC 38 WC

[WLC 38 NOTES]

Judgment Date 1915-07-08. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge)

Also reported as *Ex parte Maggs* Krummeck 99

Quick-note

Tertiary use – Normal flow – r 47, r 48, r 51(1)

Summary

M applied under s 21 of Act 8 of 1912 for permission to use a portion of the normal flow of a public stream for tertiary purposes. He offered to forego in terms of r 51(1) the quantity used by him out of the reasonable share of the stream to which he was entitled for secondary purposes.

The application was granted on condition that the maximum quantity to be extracted for tertiary purposes should at no time exceed the share to which applicant was entitled for secondary uses, and that M was restricted from returning to the stream the effluent of the water after tertiary use if it contained any injurious matter. The procedure was set out for a complaint against M concerning polluted effluent.

Sources Noted

1912 Act 8 s 21 – WLC 38.01

1912 GN 982 r 47 (Principles to Guide Water Courts) – WLC 38.10

1912 GN 982 r 48 (Principles to Guide Water Courts) – WLC 38.10

1912 GN 982 r 51(d) (Principles to Guide Water Courts) – WLC 38.07

Coetzee v Coetzee 1915 Uys WLC 39 WC

[WLC 39 NOTES]

Judgment Date 1915-08-03. **Court** WC (Lichtenburg) **Judge(s)**: C JEPPE

Quick-note

Subdivision of land – servitude

Summary

When subdividing an inherited farm between R and A, whereby the rights of use of two springs on the farms was also agreed on, A contended that R used more of the water than he was entitled to in terms of the agreement.

Held, after the court appointed an engineer to investigate the facts of the dispute, that the intake of the furrows which take the water to the lands of the parties, must be fixed to effectively control the water flowing therein, in order to effectively implement the agreement.

Sources Noted

1912 Act 8 s 32(a) – WLC 39.01

Rand Water Board re Vaal River 1916 Uys WLC 40 WC

[WLC 40 NOTES]

Judgment Date 1916-05-19. **Court** WC (Johannesburg) **Judge(s)**: JER de VILLIERS

Also reported as *Ec parte Rand Water Board* Krummeck 102

Quick-note

Normal flow - Point and Method of determination.

Summary

When the normal flow of a stream is determined, the actual quantity of winter flow, and not the extent of riparian land which is irrigable by means of direct irrigation from the stream, is the determining factor. In this case the quantity of water which could be directly and beneficially used for irrigation, is equivalent to the measured flow of the stream during the season of steady flow in the stream.

Sources Noted

1912 Act 8 s 10 – WLC 40.30, WLC 40.32, WLC 40.35

1912 Act 8 s 45(1)(g)(iv) – WLC 40.30

1912 GN 982 r 68 (Principles to Guide Water Courts) – WLC 40.31, WLC 40.32, WLC 40.35, WLC 40.42, WLC 40.43, WLC 40.45

1912 GN 982 r 69 (Principles to Guide Water Courts) – WLC 40.42

1914 Act 18 s 3 (Rand Water Board Supplementary Water Supply) – WLC 40.61, WLC 40.62, WLC 40.63

1914 Act 18 s 4 (Rand Water Board Supplementary Water Supply) – WLC 40.61, WLC 40.62

1914 Act 18 s 14 (Rand Water Board Supplementary Water Supply) – WLC 40.01, WLC 40.06, WLC 40.07, WLC 40.08, WLC 40.09, WLC 40.17, WLC 40.18, WLC 40.28, WLC 40.48, WLC 40.53, WLC 40.54, WLC 40.63, WLC 40.64, WLC 40.77, WLC 40.85, WLC 40.86

1914 Act 18 s 20 (Rand Water Board Supplementary Water Supply) – WLC 40.06

1917 GN 459 r 101 (Water Court Rules) – WLC 40.72, WLC 40.79

1917 GN 459 r 104 (Water Court Rules) – WLC 40.72, WLC 40.79

***Touyz, R v* 1916 Uys WLC 41 C**

[WLC 41 NOTES]

Judgment Date 1916-07-10. **Court** CPD. **Judge(s)**: EJ BUCHANAN, FG GARDINER

Also reported as *R v Touyz* 1916 CPD 380

Quick-note

Offence of diverting water from a river – burden on accused to prove his right to do so – Riparian owner has *prima facie* right to water – proof of ownership discharges onus

Summary

T was charged in the magistrates' court with contravening s 133(1)(b) or (e) of Act 8 of 1912 in that at Blauwkrantz, Jansenville district, he unlawfully diverted the water of a dam in the Sundays river on the complainant's farm to a lower dam in the river for his own benefit. He was found guilty of contravening s 133(1)(e) and sentenced to a fine or one week's imprisonment.

On appeal, held that the Act placed the onus on the accused to prove that he had the right to divert water; that the accused was a riparian owner on a public stream; that as such he was *prima facie* entitled to take water from the river for his primary needs; and that he therefore discharged the onus which the Act cast on him. The conviction was accordingly set aside.

Sources Noted

1912 Act 8 s 133(1) – WLC 41.01

***Venter v De Villiers* 1916 Uys WLC 42 WC**

[WLC 42 NOTES]

Judgment Date 1916-07-19. **Court** WC (Bethulie). **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *Venter v De Villiers* Krummeck 122

Quick-Note

Water rights by Prescription – adverse act. – prescriptive acquisition of servitude of aqueduct

Summary

A riparian owner on a stream had, for the period of prescription, regularly cleaned out a certain spring in the stream, which was situated on an upper owner's land, in order to increase the flow in the stream.

In an application for declaration of rights, it was held –

This action and the extensive irrigation which had been established with this water on the lower riparian owner's land, does not entitle him to more than his reasonable share in the normal flow of the stream, and neither does it deprive the upper owner of his reasonable right by prescription, unless it can be proved that the upper owner had been prevented to use his share.

Sources Noted

1912 GN 982 r 2(b) (Principles to Guide Water Courts) – WLC 42.35

1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 42.31

1912 GN 982 r 9(vi) (Principles to Guide Water Courts) – WLC 42.18

1912 GN 982 r 9(vii) (Principles to Guide Water Courts) – WLC 42.18

De Klerk v Niehaus 1897 C (14 SC) 302 – WLC 42.12

Jordaan v Winkelman 1879 C (9 B) 79 – WLC 42.15, WLC 42.17

***New Heriot Gold Mining Co Ltd v Union Government* 1916 Uys WLC 43 A**

[WLC 43 NOTES]

Judgment Date 1916-10-06. **Court** AD. **Judge(s)** J ROSE-INNES (Chief Justice), WH SOLOMON, CG MAASDORP (Judges of Appeal)

Also reported as *New Heriot Gold Mining Company Limited, Appellant v Union Government (Minister of Railways and Harbours), Respondent* 1916 AD 415

Quick-note

Natural flow of water – diversion by railway embankment – flood damage in neighbouring mine – embankment constructed under statutory powers – vis major – proof of rainfall

Summary

A very heavy storm of rain flooded the underground works of N's mine. N sued the Union Government (G) for damages, alleging that the flooding was due to storm-water which was collected and diverted from its natural course by a railway embankment of G who was negligent in not making sufficient provision for the carrying off of such water.

G's defences were: (a) that the embankment was constructed by G's predecessor, the NZASM, and G was not liable if the construction was deficient; (b) that the flooding of the mine was due to vis major, such a heavy rain storm being unforeseeable; (c) that there was contributory negligence, in that a portion of the water which flooded the mine came

via a siding which was constructed at N's request; (d) that the railway was built under statutory powers, which excluded damages claims. The court held against N, who appealed to the AD

HELD:

- (1) In principle one may not by artificial works discharge on his neighbour's land water which would not naturally flow there or concentrate and increase the natural flow to the neighbour.
- (2) The defence of vis major is only available if the rain was of such intensity as could not reasonably have been expected. But those who have to deal with flood-water should provide a considerable margin of safety. Clear proof is necessary of the volume of rain which fell.
- (3) If works were legislatively authorised, reasonable precautions are to be taken to prevent injury, eg the work should not be done or maintained negligently. It was therefore the duty of the Railway Administration to make proper provision by way of drains and culverts to prevent injury to neighbouring property by water the flow of which has been altered or concentrated by its works.
- (4) On the facts, the mine was in part flooded by water which was concentrated or diverted by G's works and which was discharged into N's mine under conditions more detrimental than if it had followed its natural flow; that this was due to the negligence of G who had not made sufficient provision for carrying off water the natural flow of which was obstructed by the railway works.
- (5) That G could not raise the defence of his predecessor's negligence in the present circumstances;
- (6) That the rainfall was not so violent as to amount to vis major;
- (7) That there was no contributory negligence of N in respect of failure to provide on its own property sufficient protection against storm-water, and in respect of the existence of openings whereby water was allowed to enter the mine; that G was liable for damage due to water which flowed down the railway siding erected at N's request;
- (8) That the flooding would not have occurred if the embankment had not existed;
- (9) That G was liable to N for so much of the total damage as was due to water diverted from its natural flow by the railway works; and
- (10) That the amount of damages would be negotiated or decided later.

Sources Noted

Great Western Railway Co of Canada v Braid & Fawcett 1863 8 LT NS 31 PC; 15 ER 640; 1 Moore PCC NS 101 – WLC 43.122, WLC 43.127

Halliwell v Johannesburg Municipal Council 1912 A 659 – WLC 43.08

Jameson's Minors v Central SA Railways 1908 T 575 – WLC 43.122, WLC 43.127

Nitro Phosphate & Odam's Chemical Manure Co v London & St Katharine's Docks Co 1874 LR 9 Ch 503 – WLC 43.70

***Coxton v Bezuidenhout re Koster River* 1916 Uys WLC 44 WC**

[WLC 44 NOTES]

Judgment Date 1916-11-23. **Court** WC (Rustenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *In re Koster River* Krummeck 131

Quick-Note

Main stream and tributaries – distinction

Summary

Application for determination of water rights and the apportionment of the water of 3 streams at their confluence with the Koster river.

Held: That in the circumstances it was impossible to determine which of the three streams was the main stream and which were tributaries. Therefore they were all three regarded as “contributories” to the Koster river and as such formed part of the Koster river system.

Sources Noted

1912 Act 8 s 10(4) – WLC 44.01

***Rand Mines Power Supply Co Ltd re Vaal River Barrage* 1917 Uys WLC 45 WC**

[WLC 45 NOTES]

Judgment Date 1917-02-19. **Court** WC (Johannesburg). **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *Ex parte Rand Mines Power Supply Co Ltd* Krummeck 133

Quick-Note

Storage of surplus water for tertiary use.– preference of secondary over tertiary use)

Summary

Application for storage of surplus water for tertiary use

Tertiary use of water of a public stream is subject to reasonable secondary use by all upper and lower riparian proprietors. Reasonable secondary use has a preferent claim to water in competition with tertiary use and this preference applies to surplus water as well as normal flow.

When a court considers an application for storage of surplus water for tertiary use under section 20, it takes into account

prior domestic requirements, stock watering and agricultural needs, as well as the reasonable future requirements of agriculture (which is the amount of surplus water necessary for irrigating the extent of riparian land which can in the future be beneficially irrigated from storage schemes.

It is the responsibility of the applicant to furnish this information, and the failure of interested parties to attend the hearing does not mean that their rights need not be considered.

Sources Noted

1912 Act 8 s 11(6) – WLC 45.48, WLC 45.50
1912 Act 8 s 13 – WLC 45.45
1912 Act 8 s 14 – WLC 45.07, WLC 45.10, WLC 45.48
1912 Act 8 s 15 – WLC 45.07
1912 Act 8 s 20 – WLC 45.07, WLC 45.10, WLC 45.22, WLC 45.24, WLC 45.25
1912 Act 8 s 24(a) – WLC 45.05
1912 Act 8 s 45(1)(g)(ii) – WLC 45.23, WLC 45.24
1912 Act 8 s 45(2) – WLC 45.24
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 45.33, WLC 45.45
1912 GN 982 r 20 (Principles to Guide Water Courts) – WLC 45.33
1912 GN 982 r 25 (Principles to Guide Water Courts) – WLC 45.28
1912 GN 982 r 26 (Principles to Guide Water Courts) – WLC 45.33
1912 GN 982 r 32-43 (Principles to Guide Water Courts) – WLC 45.24
1912 GN 982 r 33 (Principles to Guide Water Courts) – WLC 45.25
1912 GN 982 r 35 (Principles to Guide Water Courts) – WLC 45.25, WLC 45.26, WLC 45.27, WLC 45.28, WLC 45.30, WLC 45.32, WLC 45.34, WLC 45.36, WLC 45.37, WLC 45.38
1912 GN 982 r 40 (Principles to Guide Water Courts) – WLC 45.33
1912 GN 982 r 51 (Principles to Guide Water Courts) – WLC 45.33
1912 GN 1692(1) r 101-107 (Water Court Rules) – WLC 45.38
1914 Act 18 s 3 (Rand Water Board Supplementary Water Supply) – WLC 45.08, WLC 45.17, WLC 45.18, WLC 45.19
1914 Act 18 s 4 (Rand Water Board Supplementary Water Supply) – WLC 45.05, WLC 45.10, WLC 45.15, WLC 45.14, WLC 45.16, WLC 45.17, WLC 45.21, WLC 45.40, WLC 45.42, WLC 45.44, WLC 45.45, WLC 45.46, WLC 45.47, WLC 45.53, WLC 45.66
1914 Act 18 s 11 (Rand Water Board Supplementary Water Supply) – WLC 45.27
1914 Act 18 s 14 (Rand Water Board Supplementary Water Supply) – WLC 45.09, WLC 45.10, WLC 45.19, WLC 45.31, WLC 45.43, WLC 45.60, WLC 45.63, WLC 45.68
1914 Act 18 s 15 (Rand Water Board Supplementary Water Supply) – WLC 45.18, WLC 45.19, WLC 45.21
1914 Act 18 s 16 (Rand Water Board Supplementary Water Supply) – WLC 45.21
1914 Act 18 Sched 2 (Rand Water Board Supplementary Water Supply) – WLC 45.06

***Kolver v Malan* 1917 Uys WLC 46 WC**

[WLC 46 NOTES]

Judgment Date 1917-02-23. **Court** WC (Edenburg). **Judge(s)** JER DE VILLIERS (Water Court Judge).

Also reported as *Kolver v Malan* Krummeck 147

Quick-Note

Servitude of storage – Good faith – damages against benefit – market value

Summary

Application for servitude of storage.

R objected against A's application for a servitude to submerge a portion of R's farm with a storage dam, on the basis that A did not comply with the element of good faith as required in sec 110(1)(e)(iii), because A was not of intention to irrigate from the dam, but rather to use the dam to raise the market value of the land for purposes of speculation.

Held –

It is not an element of good faith (as required in section 102) that A must have the intention to employ the water for his own benefit.

The elements of damage and benefit are those of the parties, and not of the general public.

The benefit should be weighed against the damage, and for determining the benefit, the current market value of the land at the time of the application is taken, and not the raised value after completion of the dam.

Sources Noted

1912 Act 8 s 110(1)(e)(iii) – WLC 46.02, WLC 46.03
1912 Act 8 s 110(1)(e)(iv) – WLC 46.02
1912 Act 8 s 110(1)(e)(vi) – WLC 46.02, WLC 46.10, WLC 46.21
1912 Act 8 s 102 – WLC 46.07
1912 Act 8 s 113 – WLC 46.04

***Du Plessis & De Villiers* 1917 Uys WLC 47 WC**

[WLC 47 NOTES]

Judgment Date 1917-03-20. **Court** WC (Marikana). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Du Plessis & De Villiers* Krummeck 154

Quick-Note

Water rights acquired under previous legislation

Summary

Application for the use, diversion or appropriation of water of a public stream.

A riparian owner claimed that he was entitled to divert all the water he could use for secondary purposes, as prior to the coming into force of Act 7 of 1908 he had constructed certain works by which he could beneficially use such water in terms of s 24(a) of Act 8 of 1912, and that under the Transvaal Water Law of 1894, s 10 and 12, he had been entitled to all the water which could be reasonably used on the farm.

Held, that the words “used in a reasonable manner” in sec. 10 of the 1894 law, did not confer the right claimed, but should be interpreted to have the same effect as the words “reasonably used” in s 12 of Act 8 of 1912.

Held, further, that even if the right claimed had been conferred by the 1894 law, such right was cancelled by sec 46 of Act 27 of 1908, and that when the 1912 Act came into force the claimant was no longer entitled to use the water as claimed, and that therefore sec 24(a) did not protect him.

Sources Noted

1894 TRANSVAAL Law 11 – WLC 47.01, WLC 47.04, WLC 47.04, WLC 47.05, WLC 47.06, WLC 47.11

1894 TRANSVAAL Law 11 s 2 – WLC 47.14

1894 TRANSVAAL Law 11 s 10 – WLC 47.09, WLC 47.10, WLC 47.16

1894 TRANSVAAL Law 11 s 12 – WLC 47.09

1908 TRANSVAAL Law 27 s 46 – WLC 47.04, WLC 47.05, WLC 47.06

1912 Act 8 s 24 – WLC 47.01, WLC 47.08

1912 Act 8 s 24(a) – WLC 47.03, WLC 47.07

1912 Act 8 s 24(c) – WLC 47.03

1912 Act 8 s 138 – WLC 47.01, WLC 47.02

1912 GN 982 r 2(b) (Principles to Guide Water Courts) – WLC 47.13

Muller's Executrix v Liquidators of The Small Farms Ltd 1910 T 189 – WLC 47.16

Retief v Louw 1874 C (4 B) 165 – WLC 47.06

MAXWELL *Statutes* ed 3 p 112-13 – WLC 47.12

Cape Town Council v Benning 1917 Uys WLC 48 A

[WLC 48 NOTES]

Judgment Date 1917-05-16. **Court AD.** **Judge(s)** J ROSE-INNES (Chief Justice), WH SOLOMON, CG MAASDORP (Judges of Appeal)

Also reported as *Cape Town Council, Appellant v Benning, Respondent* 1917 A 315

Quick-note

Diversion of rainwater without property owner's knowledge – damage to lower owner – no common law remedy available against upper owner – nuisance or negligence not proved.

Summary

Rubbish was dumped on a property in Cape Town, resulting in the rainwater being diverted from its natural courses and causing damage to structures on a lower property. The lower owner claimed damages from the upper owner, alleging negligence in allowing the dumping. The upper owner denied negligence because he did not know of the dumping and therefore did not “allow” it. The supreme found that the municipality “ought to have known” of the dumping in the circumstances because it is the duty of the owner of land to prevent his property from becoming a nuisance to others and awarded damages. On appeal by the municipality to the AD:

HELD: (1) The action against diverting rain water discussed but held not available for claiming damages.

(2) The interdict against acts by force or stealth discussed – even though no interdict was asked for – but held not available against an owner unless he is the perpetrator;

(3) The allegations of negligence or nuisance held to be not proved and appeal accordingly allowed.

Sources Noted

450 BC ROME Twelve Tables – WLC 48.10

Attorney-General v Tod Heatley 1897 1 ChD 560 – WLC 48.38

Barker v Herbert 1911 2 KB 633 – WLC 48.26, WLC 48.27

Charles v Finchley Local Board 1883 23 ChD 762 – WLC 48.25

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 48.10

Rich v Basterfield 1847 16 LJ CP 273, 4 CB 783 – WLC 48.28

Saxby v Manchester Sheffield and Lincolnshire Railway Co 1869 LR 4 CP 198 – WLC 48.29, WLC 48.30

D 39 3 1 – WLC 48.11

D 39 3 4 2 – WLC 48.11, WLC 48.12

D 39 3 5 – WLC 48.14

D 39 3 6 6 – WLC 48.11

D 43 24 – WLC 48.13

HUNTER *Roman Law* 252 – WLC 48.13

VOET 39 3 2 – WLC 48.16

VOET 39 3 3 – WLC 48.16

Molteno Municipality re Stormberg Spruit 1917 Uys WLC 49 WC

[WLC 49 NOTES]

Judgment Date 1917-06-28. **Court** WC (Molteno). **Judge(s)** JER de VILLIERS.(Water Court Judge)

Also reported as *Ex parte Molteno Municipality* Krummeck 158

Quick-Note

Riparian land – normal flow – springs – seepage

Summary

When erven were not riparian to abutting to a public stream, they are not necessarily non-riparian, as the term “non-riparian” has a legal meaning in terms of sec 2 of Act 8 of 1912, being devoid of riparian rights.

For a public stream to have a “normal flow”, it is not necessary that there must at all times be present a flow from springs, seepage, etc, as referred to in s 10(2) of the Act: it is sufficient if such flow from springs, seepage, etc, forms a material or substantial portion of the total annual run-off of the stream.

To constitute a substantial portion of the flow, the water from springs, seepage etc, must be of such a volume and duration as to be by itself (apart from any flood flow) capable of riparian use by one or more riparian owners, or it must be capable only of primary use by such other owner or owners, if it ordinarily flows for the greater part of the year.

Sources Noted

1906 CAPE Act 32 s 3(f) – WLC 49.07

1912 Act 8 s 2 “public stream” – WLC 49.21, WLC 49.28

1912 Act 8 s 2 “riparian land” – WLC 49.05, WLC 49.06

1912 Act 8 s 10 – WLC 49.11

1912 Act 8 s 10(1) – WLC 49.29

1912 Act 8 s 10(2) – WLC 49.12, WLC 49.13, WLC 49.14, WLC 49.20, WLC 49.23

1912 Act 8 s 15 – WLC 49.43, WLC 49.44

1912 Act 8 s 16(1) – WLC 49.44

Mapochsgronden Streams 1917 Uys WLC 50 WC

[WLC 50 NOTES]

Judgment Date 1917-08-16. **Court** WC (Roosenekal, Middelburg (Transvaal)). **Judge(s)** JER De VILLIERS (Water Court Judge).

Also reported as *In re Mapochsgronden* Krummeck 167

Quick-Note

Application for apportionment – normal flow and surplus water – storage

Summary

Only the normal flow can be defined and apportioned under s 32(b). An application for the apportionment of surplus water is to be made under s 15 and 18.

To accumulate a weak normal flow in a dam to use it later for more efficient irrigation, is not “storage” within the meaning of s 10(1). Storage is the conservation of surplus water for use in times of scarcity.

On an application for determining the normal flow of a public stream, the court can only determine what such normal flow is at a given point – not at every point in the catchment area where works can be constructed.

It is not necessary for the court to determine the quantity of the normal flow of a public stream under s 32(f) before it grants an order defining the rights in and apportioning the normal flow under s 32(b).

Sources Noted

1912 Act 8 s 15 – WLC 50.01

1912 Act 8 s 18 – WLC 50.01, WLC 50.02

1916 Act 40 s 1 (Mapochs Gronden Water and Commonages) – WLC 50.02

Aliwal North Municipality v Jeffares 1917 Uys WLC 51 C

[WLC 51 NOTES]

Judgment Date 1917-08-17. **Court** CPD. **Judge(s)** HH JUTA (Judge President), EJ BUCHANAN, JG KOTZÉ

Also reported as *Aliwal North Municipality and Another v Jeffares* 1917 CPD 408

Quick-note

Water court – majority – power to award damages – Damages: distinguished from statutory compensation; continuing and prospective; general; reduction on appeal and costs – Weir over stream with midstream boundary – each owner on opposite sides of the river liable for all damages

Summary

The Aliwal North municipality constructed a weir across the Orange river: the southern part by statutory authority under Cape Act 13 of 1904 and the northern part by agreement with the Orange river Colony government.

The owner of a riparian property on the northern bank alleged that the weir changed the natural course of the river's flow, resulting in the silting up of the site in the river where he legally pumped water from the river, obstructing his irrigation and thereby infringing his water rights as a riparian owner. He claimed damages from the Municipality in the water court and the 2 assessors granted him certain damages but the presiding judge disagreed. On appeal by the municipality, to the CPD.

Held: That the majority decision by the assessors was a valid decision of the water court; that the water court was empowered to award damages but the amount awarded was excessive; that the appeal be allowed with costs.

Sources Noted

1873 BRITAIN c 66 (Supreme Court of Judicature Act) – WLC 51.39
1882 CAPE Act 6 (Lands and Arbitration Clauses) – WLC 51.15
1899 CAPE Act 40 s 3 (Water Disputes) – WLC 51.11, WLC 51.32, WLC 51.33
1904 CAPE Act 13 s 2 (Aliwal North Municipality Water and Electricity Supply) – WLC 51.14
1904 CAPE Act 13 s 36 (Aliwal North Municipality Water and Electricity Supply) – WLC 51.14, WLC 51.15
1906 CAPE Act 32 (is basis of 1908 Transvaal and 1912 Union Water Acts) – WLC 51.07
1911 CAPE Ord 6 (Electricity) – WLC 51.14
1912 Act 8 Chapter 4 – WLC 51.34
1912 Act 8 s 3 – WLC 51.34
1912 Act 8 s 27 – WLC 51.06, WLC 51.34, WLC 51.35
1912 Act 8 s 27(2) – WLC 51.05
1912 Act 8 s 27(3) – WLC 51.04, WLC 51.05
1912 Act 8 s 28 – WLC 51.05, WLC 51.06, WLC 51.35, WLC 51.36
1912 Act 8 s 30 – WLC 51.08, WLC 51.36
1912 Act 8 s 32(a) – WLC 51.11
1912 Act 8 s 32(h) – WLC 51.12
1912 Act 8 s 37(3) – WLC 51.12
1912 Act 8 s 42(4) – WLC 51.04
1912 Act 8 s 45 – WLC 51.43
1912 GN 1692(1) r 89 (Water Court Rules) – WLC 51.43
1917 Act 31 Criminal Procedure and Evidence Act (assessors) – WLC 51.42
American Union 1859 5 Jur NS 380 (Ireland) – WLC 51.40
Beryl, The 1884 LR 9 PD 141
Mitchell v Darley Main Colliery Co 1885 14 QBD 125, 53 LJ QB 471 CA – WLC 51.67
Lamb v Walker 1878 LR 3 QBD 38 – WLC 51.67
Maclaren v Attorney-General for Quebec 1914 AC 272 – WLC 51.27
Mitchell v Darley Main Colliery Co 1885 14 QBD 127 – WLC 51.67
Municipality of Beaufort West v Wernich 1883-4 C (2 SC) 36 – WLC 51.25
Prehn v Royal Bank of Liverpool 1870 LR 5 Ex 92; 1870 39 LJ Ex 41 – WLC 51.73
Rolin v Steward 1854 14 CB 605 – WLC 51.73
Saaiman v Van der Merwe 1906 C (23 SC) 380 – WLC 51.11
Solomon v Alfred Lodge 1917 CPD 177 – WLC 51.74
Van Niekerk & Union Government Minister of Lands v Carter 1917 A 359 – WLC 51.24, WLC 51.47
Wheeldon v Moldenhauer 1910 EDL 97 – WLC 51.74
BRUNNEMAN *ad D* 1 22 – WLC 51.38
C 1 51 1 2 – WLC 51.38
C 1 51 1 11 – WLC 51.38
D 1 22 – WLC 51.38
HEINECCIUS 5 1 237 (ad D 1 22) – WLC 51.38
PRITCHARD *Admiralty Digest* 2 ed 3 p 1466 – WLC 51.40
SUTHERLAND *Damages* 116 – WLC 51.67
SWEET *Law Dictionary* sv “assessor” – WLC 51.39
VAN BYNKERSHOEK *Quaestiones Juris Privati* 1 2 – WLC 51.38
VAN LEEUWEN *Censura Forensis* 2 1 2 13 – WLC 51.38
VOET 1 22 – WLC 51.38
VOET 5 1 58 – WLC 51.38
VOET 45 1 12 – WLC 51.71

***Chalmers v Theron* 1917 Uys WLC 52 WC**

[WLC 52 NOTES]

Judgment Date 1917-08-25. **Court** WC (Parys). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Chalmers v Theron* Krummeck 170

Quick-Note

Public stream – position of spring – jurisdiction of water court to determine boundaries of land

Summary

Application for declaration of rights and damages. Where a party files an application under s 32 (a) of Act 8 of 1912 on a dispute with regard to the water of a stream described in the application as a. public stream it is not necessary for him to file a separate application for a declaration that the stream in question is a public stream

Where the question arises whether a spring is situated on the land of one of the parties the water court has jurisdiction to decide where the boundaries of such land are situated and for that purpose to interpret transfer deeds and diagrams.

Sources Noted

1912 Act 8 s 32(a) – WLC 52.01, WLC 52.04
1912 Act 8 s 32(b) – WLC 52.07, WLC 52.09
1912 Act 8 s 32(e) – WLC 52.05
1912 Act 8 s 32(h) – WLC 52.08
1916 Act 26 (Irrigation Amendment) – WLC 52.09
Aliwal North Municipality v Jeffares 1917 Uys WLC 51 C – WLC 52.08
Breyten Collieries Ltd v Dennil (1) 1912 Uys WLC 7 T – WLC 52.11
Kirstein re Zendeling Spruit 1917 Uys WLC 53 WC – WLC 52.12
Saaiman v Van der Merwe 1906 C (23 SC) 380 – WLC 52.08
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 52.09

***Kirstein re Zendelingspruit* 1917 Uys WLC 53 WC**

[WLC 53 NOTES]

Judgment Date 1917-10-05. **Court** WC (Zeerust). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Kirstein* Krummeck 172

Quick-Note

Public stream – source on private land – owner not entitled to preferent right

Summary

Application for an appropriation. The source of a public stream arising on private land cannot be claimed as private water. The source forms part of the public stream, and the owner of the land on which it arises is not entitled to any preferent rights to the water.

Sources Noted

1908 TRANSVAAL Act 27 s 44 – WLC 53.22
1912 Act 8 s 8 – WLC 53.04, WLC 53.06, WLC 53.13, WLC 53.14, WLC 53.15, WLC 53.18, WLC 53.21, WLC 53.24, WLC 53.26
1912 Act 8 s 8(1) – WLC 53.02, WLC 53.09
1912 Act 8 s 8(2) – WLC 53.09
1912 Act 8 s 9 – WLC 53.19
1912 Act 8 s 10(4) – WLC 53.25
1912 Act 8 s 138 – WLC 53.25
Breyten Collieries Ltd v Dennil (1) 1912 Uys WLC 7 T – WLC 53.07, WLC 53.11

***Tweefontein Colliery Ltd re Cession of Water Rights* 1917 Uys WLC 54 WC**

[WLC 54 NOTES]

Judgment Date 1917-10-24. **Court** WC (Middelburg Transvaal). **Judge(s)** C JEPPE.

Also reported as *Ex parte The Tweefontein Colliery Ltd* Krummeck 177

Quick-Note

Surplus water – permit to store – cession

Summary

An application to confirm a cession of rights under a permit to store surplus water, was refused because the purpose of use must be same purpose for which the permit had been granted.

Sources Noted

1908 TRANSVAAL Act 27 – WLC 54.01
1910 TRANSVAAL Act 15 (Power) – WLC 54.05

***Van Dyk v Van Dyk* 1917 Uys WLC 55 WC**

[WLC 55 NOTES]

Judgment Date 1917-10-31. **Court** WC (Calvinia). **Judge(s)** JER DE VILLIERS (Water Court Judge)

Also reported as *Van Dyk v Van Dyk* Krummeck 180

Quick-Note

Point of diversion

Summary

A person entitled to the use of a certain quantity of water at a given point on a public stream has the right to divert an equivalent quantity from the stream at any other point and it may happen that the amount which he is entitled to divert at such other point is larger or smaller or is (for practical purposes) nil.

The water court may fix places at which an applicant shall be deemed to have a right to divert water, and determine the nature and extent of such right, but it does not include the power to impose servitudes of aqueduct, abutment etc

Sources Noted

1912 Act 8 s 32(g) – WLC 55.12, WLC 55.17, WLC 55.19
1912 Act 8 s 101 – WLC 55.14, WLC 55.17
1912 Act 8 s 110 – WLC 55.03, WLC 55.07

Smartt Syndicate Ltd re Ongers River (1) 1917 Uys WLC 56 WC

[WLC 56 NOTES]

Judgment Date 1917-11-27. **Court** WC (Britstown). **Judge(s)** JER de VILLIERS.

Also reported as *Ex parte Smartt Syndicate* Krummeck 184

Quick-Note

Application for protection – Preliminary hearing – riparian owner – storage or diversion works

Summary

In an application for protection, the preliminary hearing is substantially in the nature of an ex parte proceeding.

The notice to be served on riparian owners for purposes of a protection must call on riparian owners to declare their existing as well as proposed storage or diversion works, but only in respect of the storage of the water of public streams, not private streams.

“Riparian owner” means an owner whose farm is riparian to a public stream, not one over whose land water flows which does not qualify as a public stream.

Sources Noted

1912 Act 8 s 8 – WLC 56.18

1912 Act 8 s 10 – WLC 56.19

1912 Act 8 s 15 – WLC 56.01, WLC 56.29, WLC 56.27, WLC 56.30

1912 Act 8 s 16 – WLC 56.26, WLC 56.27, WLC 56.29, WLC 56.30

1912 Act 8 s 16(1) – WLC 56.01, WLC 56.02, WLC 56.04, WLC 56.05, WLC 56.10, WLC 56.11, WLC 56.12, WLC 56.14, WLC 56.17, WLC 56.20, WLC 56.27, WLC 56.30

1912 Act 8 s 16(6) – WLC 56.05

1912 Act 8 s 24(a) – WLC 56.16, WLC 56.30

1912 GN 982 r 12 (Principles to Guide Water Courts) – WLC 56.02, WLC 56.06, WLC 56.21, WLC 56.22, WLC 56.23

1912 GN 982 r 19 (Principles to Guide Water Courts) – WLC 56.29

Van Marseveen v Union Government 1918 Uys WLC 57 A

[WLC 57 NOTES]

Judgment Date 1918-02-04. **Court** AD. **Judge(s)** J ROSE-INNES (Chief Justice), WH SOLOMON, CG MAASDORP, HH JUTA (Judges of Appeal), HJ WESSELS (Acting Judge of Appeal)

Also reported as *Van Marseveen Appellant v Union Government (Minister of Lands) Respondent* 1918 AD 200

Quick Note

Expropriation for Hartebeestpoort irrigation scheme – including land for labourers camps and quarries – ultra vires – land expropriated for a scheme is to be “necessary” and not merely “convenient”

Summary

A notice of expropriation signed by an official acting in the name of the Minister and under his authority is a notice given by the Minister.

Land for labourers' camps and for quarries cannot be expropriated under the Transvaal Proclamation 5 of 1902, as modified by s 98 of the Irrigation Act 8 of 1912, in connection with the irrigation works authorized by Act 32 of 1914.

The Hartebeestpoort Irrigation Scheme Act 32 of 1914 is equivalent to a resolution of both Houses of Parliament, and therefore in compliance with the terms of s 98 of the Irrigation Act, 1912.

Sources Noted

1813 CAPE Proc 6 August s 4 (Proclamation by Governor JF Cradock: Conversion of Loan Lands to Quitrent) – WLC 57.88

1845 BRITAIN c 18 (Lands Clauses Consolidation Act) – WLC 57.17

1858 CAPE Act 9 (Public Roads) – WLC 57.89

1889 CAPE Act 40 s 144-147 (Divisional Councils) – WLC 57.44, WLC 57.89

1902 TRANSVAAL Proc 5 (Land Arbitration Clauses) – WLC 57.04, WLC 57.21, WLC 57.23, WLC 57.25, WLC 57.19, WLC 57.25, WLC 57.29, WLC 57.30, WLC 57.31, WLC 57.32, WLC 57.33, WLC 57.40, WLC 57.42, WLC 57.57, WLC 57.58, WLC 57.64, WLC 57.73, WLC 57.75, WLC 57.100, WLC 57.109, WLC 57.110, WLC 57.122

1902 TRANSVAAL Proc 5 s 2 (Land Arbitration Clauses) – WLC 57.16, WLC 57.57, WLC 57.122

1902 TRANSVAAL Proc 5 s 6 (Land Arbitration Clauses) – WLC 57.16

1902 TRANSVAAL Proc 5 s 39 (Land Arbitration Clauses) – WLC 57.16

1903 TRANSVAAL Ord 20 (Expropriation of Land for Railway Purposes) – WLC 57.84, WLC 57.89

1908 TRANSVAAL Act 27 s 2 – WLC 57.58, WLC 57.59

1911 Act 2 (Crown Land Disposal) – WLC 57.73

1912 Act 8 s 7 – WLC 57.18, WLC 57.21, WLC 57.29, WLC 57.59, WLC 57.69, WLC 57.70, WLC 57.101, WLC 57.104, WLC 57.106, WLC 57.107, WLC 57.110, WLC 57.119

1912 Act 8 s 11 – WLC 57.28, WLC 57.105

1912 Act 8 s 12 – WLC 57.28, WLC 57.105

1912 Act 8 s 17 – WLC 57.101

1912 Act 8 s 97 – WLC 57.106, WLC 57.108, WLC 57.109, WLC 57.110, WLC 57.122

1912 Act 8 s 98 – WLC 57.12, WLC 57.32, WLC 57.33, WLC 57.42, WLC 57.47, WLC 57.59, WLC 57.60, WLC 57.64, WLC 57.65, WLC 57.68, WLC 57.71, WLC 57.72, WLC 57.73, WLC 57.74, WLC 57.76, WLC 57.81, WLC 57.100, WLC 57.101, WLC 57.103, WLC 57.106, WLC 57.108, WLC 57.109, WLC 57.110, WLC 57.113, WLC 57.118, WLC 57.122

1912 Act 8 s 98(1) – WLC 57.61, WLC 57.102

1912 Act 8 s 98(2) – WLC 57.24, WLC 57.31, WLC 57.59, WLC 57.62, WLC 57.64, WLC 57.73, WLC 57.101

1912 Act 8 s 99 – WLC 57.12, WLC 57.20, WLC 57.25, WLC 57.33, WLC 57.35, WLC 57.36, WLC 57.59, WLC 57.63, WLC 57.64, WLC 57.65, WLC 57.66, WLC 57.67, WLC 57.68, WLC 57.71, WLC 57.77, WLC 57.78, WLC 57.100, WLC 57.101, WLC 57.102, WLC 57.112

1912 Act 8 s 129 – WLC 57.03, WLC 57.29

1912 Act 12 s 18 (Land Settlement) – WLC 57.73

1914 Act 32 s 1 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 57.21, WLC 57.68, WLC 57.69, WLC 57.94, WLC 57.104, WLC 57.107, WLC 57.110

1914 Act 32 s 10 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 57.117

1914 Act 32 s 11 – WLC 57.68, WLC 57.71

1914 Act 32 s 12 – WLC 57.70, WLC 57.71

1914 Act 32 s 13 – WLC 57.21, WLC 57.39

1914 Act 32 s 18(2) – WLC 57.04, WLC 57.21, WLC 57.23, WLC 57.39, WLC 57.57, WLC 57.75, WLC 57.102, WLC 57.103, WLC 57.104, WLC 57.109, WLC 57.110

1914 Act 32 Schedule 1 – WLC 57.14, WLC 57.41, WLC 57.57, WLC 57.75, WLC 57.82, WLC 57.94, WLC 57.95, WLC 57.96, WLC 57.97, WLC 57.98, WLC 57.99, WLC 57.111, WLC 57.122, WLC 57.123

Landmark v Van der Walt 1884-5 C (3 SC) 300 – WLC 57.120

***Union Government v Zak River Estates Ltd* 1918 Uys WLC 58 WC**

[WLC 58 NOTES]

Judgment Date 1918-04-03. **Court** WC (Cape Town). **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *Union Government v Zak River Estates Limited* Krummeck 195

Quick-Note

Surplus water – Use for reclaiming brack lands – Quantity which an owner can be reasonably expected to use

Summary

The term “secondary use” includes not only the use of surplus water from a public stream for ordinary irrigation purposes, but also to use an additional quantity for controlling brack, by flooding the land in order to reclaim it.

Sources Noted

1906 CAPE Act 32 s 7 – WLC 58.56
 1906 CAPE Act 32 s 8 – WLC 58.53
 1906 CAPE Act 32 r 114 – WLC 58.58
 1912 Act 8 s 14 – WLC 58.36, WLC 58.37, WLC 58.43, WLC 58.50, WLC 58.56
 1912 Act 8 s 18 – WLC 58.01, WLC 58.02, WLC 58.03, WLC 58.36, WLC 58.82
 1912 GN 982 r 18 (Principles to Guide Water Courts) – WLC 58.36
 1912 GN 982 r 19 (Principles to Guide Water Courts) – WLC 58.36
 1912 GN 982 r 20 (Principles to Guide Water Courts) – WLC 58.36
 1917 GN 459 r 103 (Water Court Rules) – WLC 58.61

***Grobler v Retief* 1918 Uys WLC 59 WC**

[WLC 59 NOTES]

Judgment Date 1918-05-23. **Court** WC (Rustenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Grobler v Retief* Krummeck 211

Quick-Note

Water rising on land – owners on tributary – rights against main stream – division of water

Summary

Application for definition and apportionment of water

An owner of land is entitled to the exclusive use of water rising thereon, but this does not apply to water forming a source of a public stream.

The riparian owners on a tributary of a public stream are entitled to the full reasonable use required by them for secondary purposes, before they can be compelled to let any water flow down to the main stream.

Riparian owners on a tributary of a public stream are entitled to claim a division of the use of the water which they jointly receive without being compelled to apply for or to await a general division of the whole river.

Sources Noted

1912 Act 8 s 2 “public stream” – WLC 59.30, WLC 59.49
 1912 Act 8 s 2 “riparian ground” – WLC 59.65
 1912 Act 8 s 8 – WLC 59.10, WLC 59.11, WLC 59.13, WLC 59.24, WLC 59.35, WLC 59.39, WLC 59.41, WLC 59.46, WLC 59.48, WLC 59.51
 1912 Act 8 s 9 – WLC 59.43
 1912 Act 8 s 10(4) – WLC 59.16, WLC 59.45, WLC 59.53, WLC 59.56, WLC 59.60, WLC 59.61, WLC 59.68
 1912 Act 8 s 12 – WLC 59.57, WLC 59.67
 1912 Act 8 s 32(a) – WLC 59.76, WLC 59.87
 1912 Act 8 s 32(b) – WLC 59.76

1912 Act 8 s 48 – WLC 59.64
 1912 Act 8 s 62 – WLC 59.65
 1912 GN 982 r 1-10 (Principles to Guide Water Courts) – WLC 59.21
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 59.82, WLC 59.83
Breyten Collieries v Dennil Ltd (2) 1913 Uys WLC 11 T – WLC 59.45, WLC 59.46
Brouwer v De Wit 1908 C (25 SC) 801 – WLC 59.62
Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 59.55
Erasmus v De Wet 1874 C (4 B) 204 – WLC 59.37
Hiscock v de Wet 1880-4 A (1 BAC) 58 – WLC 59.27, WLC 59.41
Jordaan v Winkelman & The Colonial Government 1879 C (9 B) 79 – WLC 59.41
Kirstein re Zendeling Spruit 1917 Uys WLC 53 WC – WLC 59.51, WLC 59.52
Kock v Theron 1906 C (23 SC) 120 – WLC 59.37
Meyer v Johannesburg Waterworks Co 1893 T (Hertzog) 1 – WLC 59.42
Nel v Potgieter 1880-4 A (1 BAC) 22 – WLC 59.63
Retief v Louw 1874 C (4 B) 165 – WLC 59.37
Southey v Schombie 1880-1 E (1 EDC) 286 – WLC 59.36, WLC 59.38, WLC 59.42, WLC 59.53
Union Government re Mooi River (2) 1915 Uys WLC 32 WC – WLC 59.49
Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 59.41
JUTA Water Rights p 47 – WLC 59.40
 VOET 8 3 6 – WLC 59.41

***De Beer v Engelbrecht* 1918 Uys WLC 60 WC**

[WLC 60 NOTES]

Judgment Date 1918-07-19. **Court** WC (Rustenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *De Beer v Engelbrecht* Krummeck 227

Quick-Note

Jurisdiction – water dispute

Summary

Application for the use, diversion and appropriation of water.

A water court has jurisdiction to consider and adjudicate issues connected to the application but which are not contained in the pleadings.

Sources Noted

1899 Cape Act 40 (Water Rights and Disputes) – WLC 60.40
 1912 Act 8 s 32 – WLC 60.37
 1912 Act 8 s 32(a) – WLC 60.16
 1912 Act 8 s 32(b) – WLC 60.16, WLC 60.39
 1912 Act 8 s 32(g) – WLC 60.39
 1912 Act 8 s 32(i) – WLC 60.39
 1912 Act 8 s 34 – WLC 60.16, WLC 60.37
 1912 Act 8 s 110 – WLC 60.39
 1916 Act 26 s 2 – WLC 60.15
Aliwal North Municipality v Jeffares 1917 Uys WLC 51 C – WLC 60.41
Du Plessis v Le Roux 1914 AD 138 – WLC 60.32
Saaiman v Van der Merwe 1906 C (23 SC) 380 – WLC 60.40
Smith v Smith (2) 1914 Uys WLC 22 A – WLC 60.31
Van Heerden v Smir 1915 Uys WLC 36 C – WLC 60.14
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 60.14

***Klein Berg River (1)* 1918 Uys WLC 61 WC**

[WLC 61 NOTES]

Judgment Date 1918-09-10. **Court** WC (Tulbach). **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *In re Kleinberg River (1)* Krummeck 235

Quick-Note

Prescription. – Interruption – Breaching of dam

Summary

Application for definition and apportionment of rights.

An upper riparian owner diverted water in excess of his reasonable share for irrigation and also for veld flooding. A lower riparian owner requested him to pass down such water as he was using for veld flooding and did not require for crop irrigation, to which request he complied. Held, that this did not constitute an interruption in respect of the upper owner's prescriptive user of water for irrigation.

If a lower owner breaches a dam which an upper owner has built in a public stream, while he contests the upper owner's right in respect of the water in the dam, the breaching constitutes an interruption either in the continuity or in the peaceability of the upper owner's user.

Prescriptive rights may be acquired by a riparian proprietor –

- (a) by continuously diverting the whole flow of the stream throughout the year or at any rate during the dry season of each year.
- (b) by continuously diverting during the dry season or throughout the year, all the flow up to a certain fixed quantity exceeding his "reasonable share."
- (c) by diverting at regular intervals during the dry season or throughout the year, the whole flow or up to a fixed quantity exceeding his reasonable share.

Sources Noted

1912 Act 8 s 32(b) – WLC 61.03
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 61.07, WLC 61.78
De Klerk v Niehaus 1897 C (14 SC) 302 – WLC 61.56
De Klerk v Niehaus 1898 C (15 SC) 1 – WLC 61.56
Nel v Kleinhans 1905 C (22 SC) 50 – WLC 61.56
Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 61.75
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 61.57
 VOET 41 3 1 – WLC 61.69
 VOET 44 3 9 – WLC 61.35

***SA Rubber Manufacturing & Tyre Co Ltd re Umgeni River* 1918 Uys WLC 62 WC**

[WLC 62 NOTES]

Judgment Date 1918-12-02. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte South African Rubber Manufacturing & Tyre Co Ltd* Krummeck 250

Quick-Note

Tertiary use – conditions for permission to abstract water for power generation

Summary

Application for permission to use normal flow for tertiary uses

When leave is given to abstract a portion of a public stream for the generation of power, conditions will be imposed to ensure the proper use and to prevent abuse of the rights given, and the permission will be subject to sec 22 of the Irrigation Act.

Sources Noted

1912 Act 8 s 21 – WLC 62.01
 1912 Act 8 s 22 – WLC 62.34
 1912 GN 1692(1) r 45 (Water Court Rules) – WLC 62.12

***Bishop v Humphries* 1919 Uys WLC 63 W**

[WLC 63 NOTES]

Judgment Date 1919-01-14. **Court** WLD. **Judge(s)** R GREGOROWSKI

Also reported as: *Bishop v Humphries* 1919 WLD 13

Quick-note

Rain water – lower land to accept natural flow from upper land – alteration of land by township development – terminates common law servitude of concentrated flow onto neighbouring property (*stillicidii*)

Summary

In an application for an interdict against a lower owner restraining him from closing an opening in the corrugated iron fence between their stands in a township and thereby preventing the discharge of storm water from the upper owner's roof, held, that the water coming from the roof comes in a concentrated form, and therefore the general doctrine is that an owner cannot throw the water from his roof on to the adjoining neighbour's land, whatever the levels may be, unless he has a servitude to receive rain water [*servitus stillicidii recipiendi*]. Every owner has to make some provision for the water coming from his roof and to provide against such water falling on his neighbour's land and causing damage and inconvenience there.

Similarly he cannot let the water fall from his own roof on to his own land and claim the right to lead it through an aperture on to his neighbour's land. This would not be a natural flow of water but it would be an artificial discharge operated by the hand of man. By putting up buildings the natural disposition of the rainwater flow has been altered and the owner of the buildings must see that the water that he has collected on his roof does not damage his neighbour's property.

Sources Noted

[No sources were noted in the judgment]

***Jeffares v Aliwal North Municipality* 1919 Uys WLC 64 WC**

[WLC 64 NOTES]

Judgment Date 1919-02-15. **Court** WC (Cape Town). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Jeffares v Municipality of Aliwal North and Government of the Union of South Africa* Krummeck 255

Quick-Note

Dam causing damage – order to remove

Summary

Application under s 32(h) of Act 8 of 1912.

When a weir has been legally erected but caused damage to others, the Court will not order its removal without giving the respondent the alternative of paying the prospective damages.

When the construction of a weir has deprived a riparian owner of the use of the water from a river to which he is entitled, the prospective damages should be based on the difference in value between irrigated land and dry land on the area of land which had been deprived of water in that way

When a defendant in an action for prospective damages suggests measures by which such damages can be obviated or diminished, the onus is on him to prove fully that such measures will be effective and that their expenses will be less than the amount of the prospective injury.

Sources Noted

1912 Act 8 s 110 – WLC 64.16

Domingo v Colonial Government 1905 C (22 SC) 101 – WLC 64.30

Jameson's Minors v Central SA Railways 1908 T 575 – WLC 64.34

Mitchell v Darley Main Colliery Co 1885 14 QBD 125, 53 LJ QB 471 CA – WLC 64.91

MAYNE *Damages* ed 7 p 469 – WLC 64.68

***Klein Berg River (2)* 1919 Uys WLC 65 WC**

[WLC 65 NOTES]

Judgment Date 1919-04-23. **Court** WC (Cape Town). **Judge(s)** JER de VILLIERS (Water Court Judge).

Also reported as *In re Kleinberg River (2)* Krummeck 276

Quick-Note

Agreement to divert water – parties to apportionment application to file claim – prescription claims

Summary

Application for definition and apportionment of water.

If, during an application for definition and apportionment of water, the majority of the parties involved conclude an agreement to divert and apportion the water inter se, the water court may nevertheless proceed to apportion the water in the interest of the remaining parties.

A party to an application for apportionment may be compelled to file a pleading to define his claim to water rights.

The failure of a joint in limine plea for description does not debar the parties to prove prescription individually, in order to negate a lower owner's claim for water rights in respect of the owner, subject to the prescription claim.

Sources Noted

1912 Act 8 s 32(b) – WLC 65.31

***Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd* 1919 Uys WLC 66 C**

[WLC 66 NOTES]

Judgment Date 1919-06-04. **Court** CPD. **Judge(s)** JER de VILLIERS

Also reported as *Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd* 1919 CPD 125

Quick-note

Pumping water from borehole – reducing neighbour's underground water – is lawful, except: (a) if underground water flows in a known and defined channel, (b) there is a contrary servitude or (c) intention was to injure neighbour.

Summary

O conducted breweries and was the owner of properties in Newlands, Cape Town, on one of which was the Newlands spring, the water of which it used for its breweries. A commenced pumping from its boreholes on its property within 50 yards of the Newlands spring, allowing the water to run to waste. The effect of the pumping was that the spring ceased to flow.

O alleged that it was entitled to the water of the Newlands spring by purchase and prescription; that A had wrongfully deprived O from the use of such water, because the spring was fed by a subterranean stream flowing in a defined channel and A was aware of the existence of this stream and/or because the boreholes were sunk maliciously by A to deprive O of the water of the spring. O then claimed (a) a declaration of rights confirming its right to the water of the

spring; (b) a perpetual interdict restraining A from pumping from its boreholes or in any other way interfering with the flow of water from the spring; and (c) damages and costs.

In its plea, A denied O's right to the use of more than half water, due to historical servitudes in favour of certain other properties; said that it had put down boreholes on its property to disclose the existence of an artesian supply of water flowing in unknown and undefined channels far in excess of any quantity of water which had ever found an exit from the spring; denied that the water so pumped was the water of the spring; alleged that it acted legally and within its rights in carrying on the pumping operation, because its operations were carried on bona fide and legitimately for the purpose of improving the value of its land and without any malicious intent or intent to injure A any other person; and denied that O had suffered damage for which A was in law liable. A then counterclaimed for damages suffered as a result of the interdict which O had wrongfully caused to be issued.

Held, that A acted lawfully in pumping water from its own borehole even if it reduced O's spring water, because O did not prove that the underground water flowed in known and defined channels or that A's pumping was intended to injure O. But historical servitudes concerning the spring and properties in the area limited A's right to extract the spring's water. Therefore absolution against A's major claims; no interdict or damages; each to pay its own costs.

Sources Noted

1912 Act 8 s 26 – WLC 66.13
Bradford (Mayor of) v Pickles 1895 AC 587 – WLC 66.08
Brain v Marfell 41 LT NS 455 – WLC 66.40
Chasemore v Richards 1859 7 HL 349 – WLC 66.11
Colonial Government v Stephan Brothers 1900 C (17 SC) 59 – WLC 66.85
De Bruyn v Louw 1905 O 11 – WLC 66.32, WLC 66.41, WLC 66.73
Johnstone Cheese Co v Vechte 25 Am Rep 125 – WLC 66.84
Smith v Smith (1) 1913 Uys WLC 17 C – WLC 66.33, WLC 66.34
Smith v Smith (2) 1914 Uys WLC 22 A – WLC 66.33, WLC 66.34, WLC 66.41
Snyman v Boshoff 1905 O 1 – WLC 66.32, WLC 66.41, WLC 66.73, WLC 66.91, WLC 66.102
Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 66.06, WLC 66.10, WLC 66.11
D 39 3 1 12 – WLC 66.04
D 39 3 21 – WLC 66.04
D 39 3 24 12 – WLC 66.04
FARNHAM *Law of Waters* 943 – WLC 66.40
GROENEWEGEN *Leg Abr ad D* 39 3 12 – WLC 66.09
HALSBURY *Laws of England* 28 859, 862 – WLC 66.15
MERULA *Manier van Procederen* 4 2 24 – WLC 66.87
VAN ALPHEN *Papegaay* 1 26 – WLC 66.87
VOET 39 2 5 – WLC 66.39
VOET 39 3 4 – WLC 66.04, WLC 66.06
VOET 8 3 6 – WLC 66.04, WLC 66.39
VOET 8 4 13 – WLC 66.96
VOET 8 4 14 – WLC 66.39

***Smartt Syndicate Ltd v Richmond Municipality (1)* 1919 Uys WLC 67 WC**

[WLC 67 NOTES]

Judgment Date 1919-10-19. **Court** WC (Britstown). **Judge(s)** JER de VILLIERS (Water Court Judge)

Also reported as *Smartt Syndicate Ltd v Richmond Municipality and Others* Krummeck 284; and partly reported in *SALJ* 1920 37 139

Quick-note

Rights to surplus water – effect of protected works on stream – notices to other riparian owners

Summary

The right of a riparian owner to surplus water was defined by the water court as follows:

- (1) Streams with no protected works: the principle of “full requirements” applies, namely –
 - (a) He may take all the surplus water which he reasonably needs for primary and secondary;
 - (b) Waste of water constitutes an unreasonable use, such as useless irrigation and frequent and excessive flooding of veld.
 - (c) He is not confined to a proportionate share, nor need he abate *pro rata* if there is not sufficient surplus water for all the riparian owners
 - (d) He therefore enjoys priority over all owners below him but he is subject to the rights of all riparian owners above him.
 - (e) It therefore differs from “normal flow” to which riparian owners are entitled *pro rata*.
- (2) Streams with protected schemes: the principle of “proportionate shares” applies, namely –
 - (a) Two or more protected schemes on a stream are to receive proportionate shares of the surplus water
 - (b) The principle of full requirements therefore falls away if there are other works downstream which need surplus water
 - (c) If a riparian owner wants to construct a work, notices must be given to all upstream and downstream owners who may fairly be dependent on the surplus water

- (d) The share of each protected work should not be affected by priority of position
 (e) Whenever there is insufficient surplus water for all the protected works, each will have to abate pro rata.

Sources Noted

1906 CAPE Act 32 r 108 – WLC 67.100
 1906 CAPE Act 32 r 113 – WLC 67.106
 1906 CAPE Act 32 r 114 – WLC 67.100, WLC 67.106
 1906 CAPE Act 32 r 115 – WLC 67.106
 1906 CAPE Act 32 s 7 – WLC 67.89, WLC 67.100, WLC 67.106
 1906 CAPE Act 32 s 81(9) – WLC 67.73
 1908 TRANSVAAL Act 27 (Irrigation) – WLC 67.08, WLC 67.95, WLC 67.96
 1909 CAPE Act 40 s 1 (Irrigation Amendment) – WLC 67.08, WLC 67.100
 1909 CAPE Act 40 s 3 (Irrigation Amendment) – WLC 67.100
 1912 Act 8 s 11(5) – WLC 67.82
 1912 Act 8 s 11(6) – WLC 67.82
 1912 Act 8 s 12 – WLC 67.12, WLC 67.16
 1912 Act 8 s 14 – WLC 67.16, WLC 67.18, WLC 67.19, WLC 67.21, WLC 67.25, WLC 67.27, WLC 67.47, WLC 67.81, WLC 67.106
 1912 Act 8 s 15 – WLC 67.19, WLC 67.21, WLC 67.29, WLC 67.31, WLC 67.89
 1912 Act 8 s 15(1) – WLC 67.78
 1912 Act 8 s 15(2) – WLC 67.54, WLC 67.59
 1912 Act 8 s 16 – WLC 67.19, WLC 67.21, WLC 67.29, WLC 67.31
 1912 Act 8 s 16(1) – WLC 67.39, WLC 67.44, WLC 67.49, WLC 67.87, WLC 67.88, WLC 67.102, WLC 67.104, WLC 67.108
 1912 Act 8 s 16(2) – WLC 67.52, WLC 67.59
 1912 Act 8 s 16(3) – WLC 67.77
 1912 Act 8 s 16(4) – WLC 67.56, WLC 67.58, WLC 67.59
 1912 Act 8 s 16(6) – WLC 67.39
 1912 Act 8 s 17 – WLC 67.21
 1912 Act 8 s 18 – WLC 67.21, WLC 67.25, WLC 67.26, WLC 67.47, WLC 67.81, WLC 67.89, WLC 67.90, WLC 67.106
 1912 Act 8 s 20 – WLC 67.18
 1912 Act 8 s 21 – WLC 67.76
 1912 Act 8 s 23 – WLC 67.88
 1912 Act 8 s 24(a) – WLC 67.105, WLC 67.108
 1912 Act 8 s 45(1) – WLC 67.74
 1912 Act 8 s 45(1)(g) – WLC 67.11, WLC 67.12, WLC 67.24, WLC 67.72, WLC 67.73, WLC 67.74, WLC 67.75, WLC 67.76, WLC 67.77, WLC 67.78
 1912 Act 8 s 45(2) – WLC 67.11
 1912 Act 8 s 138 – WLC 67.96, WLC 67.97, WLC 67.98, WLC 67.100, WLC 67.101
 1912 GN 982 (Principles to Guide Water Courts) – WLC 67.11
 1912 GN 982 r 1-10 (Principles to Guide Water Courts) – WLC 67.09, WLC 67.13, WLC 67.24
 1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 67.44, WLC 67.108
 1912 GN 982 r 15 (Principles to Guide Water Courts) – WLC 67.60, WLC 67.61, WLC 67.78, WLC 67.87, WLC 67.103
 1912 GN 982 r 16 (Principles to Guide Water Courts) – WLC 67.62, WLC 67.78, WLC 67.103
 1912 GN 982 r 17 (Principles to Guide Water Courts) – WLC 67.62, WLC 67.63, WLC 67.64, WLC 67.65, WLC 67.70, WLC 67.78
 1912 GN 982 r 18-20 (Principles to Guide Water Courts) – WLC 67.24, WLC 67.26, WLC 67.81
 1912 GN 982 r 44-53 (Principles to Guide Water Courts) – WLC 67.76
 1912 GN 982 r 45 (Principles to Guide Water Courts) – WLC 67.76
Hough v Van der Merwe 1874 C (4 B) 148 – WLC 67.13
Jordaan v Winkelman 1879 C (9 B) 79 – WLC 67.13
Olivier v Fourie 1899 C (16 SC) 304 – WLC 67.13
Southey v Southey 1905 C (22 SC) 650 – WLC 67.03
Struben v Collett 1899 C (16 SC) 550 – WLC 67.13

***Union Government v Marais* 1920 Uys WLC 68 A**

[WLC 68 NOTES]

Judgment Date 1920-01-26. **Court AD.** **Judge(s)** J ROSE-INNES (Chief Justice), CG MAASDORP (Judge of Appeal), JER DE VILLIERS (Additional Judge of Appeal)

Also reported as *Union Government (Minister of Railways and Harbours) Appellant v Marais and Others Respondents* 1920 AD 240

Quick-note

Riparian owner – wells near river – water used for non-riparian purposes.

Summary

The Railway Administration dug 2 wells on its strip of property next to its railway lines – the one 12 yards and the other 75 yards from a riverbed – and pumped the water to the nearest station for its steam locomotives.

Lower riparian users objected that the water unlawfully reduced the water in the river to their detriment, because the nearest well received water which percolated from the river and the furthest well intercepted subterranean water which would have flowed into the river. They claimed in the water court a declaration of rights, an interdict and damages. The water court granted the claims.

On appeal by the Railways to the AD, held that the abstraction of river water for non-agricultural use was wrongful and that it was proved that the nearest well so abstracted water from the river. But the interception on one's own property

of subterranean water which would have flowed to a river was not wrongful and the appeal succeeded in respect of the furthest well.

Sources Noted

1912 Act 8 Chapter 3 – WLC 68.45
1912 Act 8 s 9 – WLC 68.82
Acton v Blundell 1843 12 M & W 324, 152 ER 1223 – WLC 68.18, WLC 68.19
Bradford (Mayor of) v Pickles 1895 AC 587 – WLC 68.16
Bradford Corporation v Ferrand 1902 2 Ch 655 – WLC 68.84
Chasemore v Richards 1859 7 HL 349, 5 H & N 982, 5 Jur NS 873 – WLC 68.19, WLC 68.21, WLC 68.22, WLC 68.26, WLC 68.27, WLC 68.28, WLC 68.30, WLC 68.32, WLC 68.84, WLC 68.89, WLC 68.90, WLC 68.94, WLC 68.95, WLC 68.121, WLC 68.124, WLC 68.126, WLC 68.133
Coleman v Lynch 1892 O (UR) – WLC 68.62
De Bruijn v Louw 1905 O 11 – WLC 68.23, WLC 68.25, WLC 68.111
De Wit & Vivier v Swart 1910 AD 239 – WLC 68.35
Dickenson v Grand Junction Canal Co 1852 21 LJ Exch 241 – WLC 68.27
Directors of the Swindon Waterworks Co v Wiltshire Canal Co LR 7 HL (E & I AC) 697 – WLC 68.95
Divisional Council Port Elizabeth v Divisional Council Uitenhage 1868 C (1 B) 40 – WLC 68.48
Frazier v Brown – WLC 68.96
Grand Junction Canal Co v Shugar 6 Ch AC 483, 24 LT 402 – WLC 68.28, WLC 68.30, WLC 68.31, WLC 68.32, WLC 68.33, WLC 68.36, WLC 68.121, WLC 68.124, WLC 68.125, WLC 68.126, WLC 68.127, WLC 68.129, WLC 68.133, WLC 68.138
Meyer v Johannesburg Waterworks Co 1893 T (H) 1 – WLC 68.36, WLC 68.62, WLC 68.109
Milton v Glen Moray Distilling Co 1898 Fraser Session Cases 1 135 – WLC 68.29
Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd 1919 Uys WLC 66 C – WLC 68.25
Schoeman v Olivier 1906-9 A (3 BAC) 234 – WLC 68.48
Seton v Blundell – WLC 68.93
Smith v Smith (2) 1914 Uys WLC 22 A – WLC 68.22, WLC 68.23, WLC 68.25, WLC 68.26, WLC 68.110
Snijman v Boshoff 1905 ORC 1 – WLC 68.23, WLC 68.25, WLC 68.111
Southey v Southey 1905 C (22 SC) 650 – WLC 68.35
Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 68.21, WLC 68.26, WLC 68.33, WLC 68.44, WLC 68.108, WLC 68.122, WLC 68.129
Wheatly v Baugh, in ANGELL 141 I – WLC 68.97
ANGELL *Water Courses* 114 – WLC 68.96
D 39 3 – WLC 68.97
D 39 3 1 12 – WLC 68.14, WLC 68.106
D 39 3 21 – WLC 68.14, WLC 68.26, WLC 68.105, WLC 68.112
D 8 5 21 – WLC 68.113
FARNHAM *Water Rights* 2 733 – WLC 68.113
FARNHAM *Water Rights* 3 599 – WLC 68.87
FARNHAM *Water Rights* 3 935 – WLC 68.43, WLC 68.98, WLC 68.100
FARNHAM *Water Rights* 3 940 – WLC 68.119, WLC 68.120, WLC 68.129
GROENEWEGEN *Leg Abr ad D* 39 3 1 12 – WLC 68.16, WLC 68.107
INSTITUTES 2 1 1 – WLC 68.131
VOET 8 3 6 – WLC 68.103, WLC 68.104
VOET 39 3 1 – WLC 68.106
VOET 39 3 4 – WLC 68.106
VOET 39 3 4 – WLC 68.17
VOET 43 12 – WLC 68.62

Stephens v De Wet 1920 Uys WLC 69 O

[WLC 69 NOTES]

Judgment Date 1920-04-01. **Court** OPD. **Case** 331/1919. **Judge(s)** JER de VILLIERS (Judge President), HJ MCGREGOR

Also reported as *Stephens v De Wet* 1920 OPD 78

Quick-note

Servitude to inundate another's land by dam to be built – damages if part of servient land with crops submerged

Summary

D was the registered owner of the farm R. S was the owner of the adjoining farm Z, which was subject to a servitude in favour of R. The servitude inter alia provided that the owner of R had the right to utilise the water in a dam being built on R, including the right to boat thereon, to convey water to the dam from the Doornspruit and the Rhenoster river and to make a furrow from the Rhenoster river to the dam.

In 1919 the Rhenoster river was in flood for the first time and filled the dam to capacity. The water submerged 108 morgen of Z, on which S had cultivated lands and standing crops. S claimed damages from D, alleging that D had wrongfully – constructed the furrow across Z; omitted to provide against flooding by not installing sluice gates; conveyed by means of the furrow an excess of water from the river into the dam; and omitted to prevent the dam inundating Z. S therefore claimed that D's alleged negligent acts entitled S to claim removal of the water, an interdict against the use of the furrow over Z, cancellation of the servitude and damages.

D denied negligence in the making of the furrow and denied any obligation to prevent the dam filling up and submerging Z. In a special plea D alleged that by the appointment of a committee under Private Ordinance 4 of 1907 (OFS), D had no power to interfere with the dam or furrow. D's alternative plea was that under s 14 of the Irrigation

Settlement Act 31 of 1909, S was not entitled to any other compensation than such as might be reasonably due to him for the right of use of his submerged land for the storage of the water complained of and that S should seek compensation by arbitration.

Sources Noted

VOET 8 4 15 – WLC 69.22

VOET 8 4 16 – WLC 69.02

Van der Heever re Marico River 1920 Uys WLC 70 WC

[WLC 70 NOTES]

Judgment Date 1920-09-24. **Court** WC (Groot Marico). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Van der Heever CS* Krummeck 310

Quick-Note

Apportionment and distribution. – Test – Costs – 1912 Act 8 s 32(b)

Summary

Application for the apportionment of a public stream

In an application for division of a public stream between the upper and lower riparian owners, the upper owners offered to let the night and Sunday water run down for the benefit of the lower owners. Some of the latter asserted that this offer was insufficient. The court decided to subject the offer to a test of two years, at the expiration of which period it should be free to any interested party to apply within three months for revision, in default of which the offer would be regarded as finally regulating the division.

Held, that the question of costs should stand over until the result of the test was known.

Sources Noted

1917 GN 459 r 9 (Water Court Rules) – WLC 70.21, WLC 70.42

Kaffir River Irrigation Board v Marais 1920 Uys WLC 71 O

[WLC 71 NOTES]

Judgment Date 1920-12-21. **Court** OPD. **Case** 495/1920. **Judge(s)** AJ MCGREGOR

Also reported as *Kaffir River Irrigation Board v Marais* 1921 OPD 46

Quick-note

Powers of irrigation board – land required for works – may purchase or expropriate – may enter land after notice – unlawful refusal by owner to allow entry before compensation paid – jurisdiction of supreme court

Summary

The respondent (M) was the registered owner of the farm Tygerpoort, district Bloemfontein, riparian to the Kaffir river, within the area of the irrigation district controlled by the applicant board (B).

B gave notice to M that it intended to erect a weir across the Kaffir river between the farms Bekkerfontein and Tygerpoort and to expropriate or purchase 14 morgen of Tygerpoort, adjacent to the site of the wall and tendered compensation therefor.

When M refused to allow B entry to the land, B obtained the Minister's consent under s 100 of Act 8 of 1912 and gave 30 days notice to M of its intention to enter the land. But M still refused entry.

B applied to the supreme court for an order to compel M to allow its officials entry to the land for the purpose of exercising the powers set out in s 89 of Act 8 of 1912 and for an interdict to restrain M from interfering with B in the exercise of such powers.

M objected against the jurisdiction of the court, alleging that the water court had sole jurisdiction because it was a dispute or claim as to water rights. He also denied the validity of B's notice and the Minister's consent.

Held: (1) Section 100 of Act 8 of 1912 is a specific and independent enactment relative to the purchase of and entry on land and other matters specified therein and such matters are not contemplated by s 32 and s 34 of the Act. The supreme court therefore has jurisdiction in matters covered by s 100 even there are proceedings before a water court concerning water rights.

(2) An irrigation board need not pay compensation for land which it proposes to purchase under s 100 before obtaining the consent of the Minister and may enter on such land after obtaining the Minister's consent and giving notice.

(3) In the absence of a regulation prescribing the notice to be given by the Minister under s 99 of Act 8 of 1912, notice which is reasonable and in conformity with the spirit of the Act is sufficient.

Sources Noted

1905 OFS Ord 11 s 9 (Expropriation) – WLC 71.16

1912 Act 8 Chapter 7 – WLC 71.06

1912 Act 8 s 32 – WLC 71.03, WLC 71.12

1912 Act 8 s 34 – WLC 71.03, WLC 71.12

1912 Act 8 s 89 – WLC 71.05, WLC 71.10

1912 Act 8 s 100 – WLC 71.05, WLC 71.07, WLC 71.09, WLC 71.10, WLC 71.11, WLC 71.12, WLC 71.15, WLC 71.19

1912 Act 8 s 100(1) – WLC 71.05, WLC 71.17
1912 Act 8 s 100(2) – WLC 71.09, WLC 71.16, WLC 71.18
1912 Act 8 s 101-110 – WLC 71.05, WLC 71.11
1912 Act 8 s 109 – WLC 71.11, WLC 71.23
1912 Act 8 s 110(2) – WLC 71.09
Van Marseveen v Union Government 1918 Uys WLC 57 A – WLC 71.20

Richter v Bloemfontein Town Council (1) 1921 Uys WLC 72 O

[WLC 72 NOTES]

Judgment Date 1921. **Court** OPD. **Judge(s)** JER DE VILLIERS (Judge President)

Also reported in the headnote of *Richter v Bloemfontein Town Council* 1922 AD 56 (on p 56-64, as an addendum to the AD judgment)

Quick-note

Right to dam river – includes the right to inundate properties – subject to agreement as to height of dam wall

Summary

In 1904 the Municipality took transfer from R of a portion of his riparian farm which the municipality intended to use for its municipal water scheme. The land was expropriated but the deed of settlement which provided for compensation, also provided for the transfer of “the water rights in and on the Modder river to which the portion of the farm hereby transferred is entitled, with the right to dam the river” with a 14 feet high wall and for the inundation of part of R’s higher riparian farm. In 1919 the Municipality raised the wall to 20 feet, resulting in a larger area of R’s higher farm being submerged.

R claimed compensation from the Municipality. Held, that the deed justified the heightening of the wall, since it was a necessary consequence of the right to dam the river.

[This judgment was reversed by the AD – *Richter v Bloemfontein Town Council* 1921 Uys WLC 87 A]

Sources Noted

1899 OFS Law 1 s 16 (Expropriation of Property) – WLC 72.03, WLC 72.40, WLC 72.41, WLC 72.50
1902 OFS Ord 11 s 33 (Law of Evidence) – WLC 72.12
De Wet v Hollow 1914 AD 157 – WLC 72.13
ANGELL *Watercourses* 157(c) – WLC 72.37, WLC 72.38
CARPZOVIUS (allowing plurality of acts) – WLC 72.38
PHIPSON *Law of Evidence* 2 46 – WLC 72.15
STEPHEN *Law of Evidence* 91(4) – WLC 72.13, WLC 72.14
VOET (allowing plurality of acts) – WLC 72.38

Camphor re Hex River 1921 Uys WLC 73 WC

[WLC 73 NOTES]

Judgment Date 1921-01-20. **Court** WC (Rustenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Camphor CS* Krummeck 319

Quick-Note

Apportionment and distribution - Costs

Summary

In an application for the division of a public stream, the task of the court is divided into apportionment, that is, the determination of the reasonable share of the water to which each property is entitled, and distribution, that is the determination of the quantity which each owner may withdraw from the stream at the point of diversion.

It is not necessary for an interested party to prove that he is receiving less water than he is entitled to, in order to succeed in an application for apportionment.

Sources Noted

1912 Act 8 s 10(4) – WLC 73.07
1912 Act 8 s 32(b) – WLC 73.01, WLC 73.08, WLC 73.33, WLC 73.34
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 73.11
Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 73.33
Reinstorf re Mozane Spruit 1914 Uys WLC 25 WC – WLC 73.36
Van der Heever re Marico River 1920 Uys WLC 70 WC – WLC 73.19, WLC 73.24

Nourse v Speck 1921 Uys WLC 74 WC

[WLC 75 NOTES]

Judgment Date 1921-03-11. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Nourse v Speck CS* Krummeck 326

Quick-Note

Source of water supply – property on main stream and on tributary – choice

Summary

Application for a definition of rights

Land was riparian to and irrigable both from the main stream and from two of its tributaries. The riparian owners on the tributaries were in a worse position as to irrigation than those on the main stream.

HELD: That the tributaries could not be regarded as “other sources of supply” under r 9(5). That such land should therefore obtain its supply exclusively from the main stream and should not claim any water from the tributaries.

Sources Noted

1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 74.01

Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 74.04

Cape Orchard Co Ltd v Conradie* 1921 Uys WLC 75 WC*[WLC 75 NOTES]**

Judgment Date 1921-04-08. **Court** WC (Worcester). **Judge(s)** JJ SCHEEPERS (Water Court Judge).

Quick-Note

Private water

Summary

In an application to decide a dispute between two riparian owners regarding the use, diversion and apportionment of the water;

HELD: Section 8 refers to private streams only; because an interpretation that it includes water that rises on land but is the source of a public stream, will lead to s 8 and s 9 being mutually destructive and inconsistent.

HELD: This is supported by the rules of construction that (a) the section heading in an Act may legitimately be consulted to solve any ambiguity, and (b) if a latter section in an Act is inconsistent with the former, the former governs.

Sources Noted

1912 Act 8 Chapter 2 – WLC 75.27

1912 Act 8 s 8 – WLC 75.05, WLC 75.06, WLC 75.07, WLC 75.19, WLC 75.20, WLC 75.24, WLC 75.25, WLC 75.28, WLC 75.29, WLC 75.31

1912 Act 8 s 9 – WLC 75.06, WLC 75.22, WLC 75.24, WLC 75.25, WLC 75.27

1912 Act 8 s 41 – WLC 75.50

1912 Act 8 s 129 – WLC 75.54

Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 75.10, WLC 75.17

DE VILLIERS *JER Water Law 1: The 8th Section [of Act 8 of 1912]*, in SALJ 1920 37 247 – WLC 75.09

HALSBURY *Laws of England* 2 526 p 263 – WLC 75.46

MAXWELL *Interpretation of Statutes* ed 3 p 59, 71 – WLC 75.26

NATHAN *Common Law of SA* 1 p 355 – WLC 75.44

VOET 41 3 6-10 – WLC 75.44

Albert Falls Power Co Ltd re Umgeni River* 1921 Uys WLC 76 WC*[WLC 76 NOTES]**

Judgment Date 1921-04-28. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte The Albert Falls Power Co Ltd* Krummeck 327

Quick-Note

Abstraction of water for tertiary use (generation of power) – conditions

Summary

Application for removal of obstruction in a public stream

When leave was given to abstract water from a public stream for tertiary use (generation of power), full provision was made for the protection of the rights of riparian owners. The court refused to give leave to abstract a definite quantity, as such might interfere with riparian rights.

Provision was also made to ensure the proper use of the rights given. The leave was given subject to s 22 of the Act.

Sources Noted

1912 Act 8 s 22 – WLC 76.64

1917 GN 459 r 45 (Water Court Rules) – WLC 76.02

Smartt Syndicate Ltd v Certain Riparian Owners* 1921 Uys WLC 77 C*[WLC 77 NOTES]**

Judgment Date 1921-05-10. **Court** CPD. **Judge(s)** MW SEARLE (Acting Judge President), LE BENJAMIN, HS VAN ZYL

Also reported as *Smartt Syndicate Ltd v Certain Riparian Owners* 1921 CPD 548

Quick-note

Surplus water – riparian owner may take all surplus water for primary and secondary use – irrigating veld is secondary use – effect of protected works on main stream and/or tributaries

Summary

The water court stated a case under s 42 of Act 8 of 1912 for the decision of the supreme court to clarify certain points of law. The statement (abbreviated) was:

1. The water court sat at Britstown and Victoria West in September 1920 to hear the application of the Smartt Syndicate Ltd for protection in respect of works of storage or diversion of surplus water of a public stream under s 15 and 16 of Act 8 of 1912.
2. The streams are the Ongers river and its tributaries
3. After notices under s 16 were given, riparian farmers on the main stream and its tributaries filed declarations under s 14 for permission to divert or store surplus water for primary and secondary purposes.
4. The Ongers has no normal flow, except for a small part of its course at the town of Victoria West and also at Britstown.
5. In September 1919 the water court declared the Smartt Syndicate entitled under s 24 of the Act to the whole of the surplus water reaching their works, because their works were completed before Act 8 of 1912 came into operation.
6. Before the water court can grant protection and definition and apportionment of the water, the supreme court must decide the following legal points.
 - (a) Whether riparian proprietors on a tributary can be compelled by law to allow surplus water to flow down to the main stream for the benefit of riparian proprietors whose properties are situated on the main stream, if they themselves can beneficially use such water for primary and secondary purposes on their riparian properties.
 - (b) Whether owners on a tributary are entitled to use surplus water for the watering of veld if the owners of riparian properties lower down have not enough for irrigating crops or lands for sowing.
 - (c) Whether, under s 14 of the Act, upper riparian proprietors on the main stream can take all the surplus water of a public stream which they can beneficially use on their riparian land or whether they must abate proportionately with owners lower down and higher up the stream. (This is irrespective of the right of the water court to grant all the water to an upper riparian proprietor when the quantity is so small that it will not reach the lower owner, etc)

HELD: If no protection of any riparian owner's works was granted under s 14 of Act 8 of 1912, the upper owners may take all the surplus water which they can beneficially use.

If protection was granted under s 15 and 16 each owner must abate in the use of surplus water proportionately with the owners lower down or higher up the stream.

Irrigating veld (grass) with surplus water of a tributary is a secondary use of water within the meaning of s 14, even though lower riparian owners on the main stream into which the tributary flows have not enough water for irrigating crops or lands for sowing, even if there are protected works on the main stream.

If there are no protected works on the main stream, the riparian owners on a tributary may take all the surplus water of the tributary which they can beneficially use for primary or secondary purposes

If there is a protected work on the main stream the riparian owners on the tributary must abate proportionately in the use of such surplus water.

If there are protected works on the tributary and protected works on the main stream the owners of the protected works on the tributary must abate proportionately with the owners of the protected works on the main stream in the use of surplus water.

Sources Noted

1912 Act 8 s 10(4) – WLC 77.18

1912 Act 8 s 11(1) – WLC 77.13

1912 Act 8 s 12 – WLC 77.18

1912 Act 8 s 14 – WLC 77.03, WLC 77.07, WLC 77.12

1912 Act 8 s 15 – WLC 77.02, WLC 77.08

1912 Act 8 s 16 – WLC 77.02, WLC 77.03, WLC 77.08

1912 Act 8 s 22 – WLC 76.64

1912 Act 8 s 24 – WLC 77.05

1912 Act 8 s 42 – WLC 77.01

1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 77.16

1912 GN 982 r 11-22 (Principles to Guide Water Courts) – WLC 77.16

1912 GN 982 r 19 (Principles to Guide Water Courts) – WLC 77.16

***Dorman v Louw* 1921 Uys WLC 78 C**

[WLC 78 NOTES]

Judgment Date 1921-06-07. **Court** CPD. **Judge(s)**: LE BENJAMIN, HS VAN ZYL

Also reported as *Dorman v Louw* 1921 CPD 652

Quick-note

Trespass claim in magistrates' court – alleged to be a water rights dispute – only water court has jurisdiction – proof of truth and bona fides of allegation

Summary

Plaintiff issued summons in a magistrate's court for damages for trespass; the defendant raised a special defence that the claim involved a dispute as to water rights, and that the water court had sole jurisdiction.

The magistrate, without hearing any evidence to show that the defence was raised bona fide, upheld the defence and dismissed the summons. On appeal –

HELD: The case must be remitted to the magistrate for evidence to show whether or not the defence was a bona fide one.

Sources Noted

1912 Act 8 s 34(1) – WLC 78.03

1917 Act 32 [jurisdiction in water cases] (Magistrates' Courts Act) – WLC 78.04

Witbank Colliery Ltd re Olifants River 1921 Uys WLC 79 WC

[WLC 79 NOTES]

Judgment Date 1921-07-15. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte The Witbank Colliery Ltd CS Krummeck 337*

Quick-Note

Use of water on non-riparian land – interim order – Conflict between non-riparian and possible but remote riparian use

Summary

Application for tertiary use of water on non-riparian land, for the service of an important township and large coal mines, the development of which was of great public importance.

The application was opposed on the basis that the water could be required for secondary use by riparian owners.

HELD: The application is granted on a temporary and conditional basis during the rainy season, without deciding whether the objection of the riparian owners is valid.

Sources Noted

1908 TRANSVAAL Act 27 [grant of surplus water] – WLC 79.17

1912 Act 8 s 23 – WLC 79.09

Smartt Syndicate Ltd v Richmond Municipality (2) 1921 Uys WLC 80 WC

[WLC 80 NOTES]

Judgment Date 1921-07-18. **Court** WC (Cape Town). **Judge(s)** JJ SCHEEPERS (Water Court Judge).

Also reported as *Smartt Syndicate Ltd v Richmond Municipality and Others (2) Krummeck 349*

Quick-Note

Surplus water – Protection. – determining annual runoff in a catchment - irrigable land – duty of water.

Summary

Application for protection.

The owner of a large farm suitable for irrigation asked for storage rights to irrigate only a portion.

HELD: He should not be ordered to abate on a pro rata basis with the other owners because he knew that there was not enough water for larger scale irrigation and he should not be penalised for having conceived his work on a smaller scale.

Riparian owners on a protected stream must allow surplus water to flow down to the main stream for the benefit of lower owners whose properties are situated on the main stream and who can beneficially use such water for primary and secondary purposes.

Owners on a tributary are entitled to use surplus water for the watering of veld even if the owners of riparian properties lower down have not enough for irrigating crops.

Runoff in a catchment is to be determined by ignoring abnormally dry years. The average of the normal years should be taken.

In determining the duty of water, perennial irrigation and sowing dam irrigation should be distinguished.

Sources Noted

1912 Act 8 s 14 – WLC 80.09

1912 Act 8 s 16 – WLC 80.97

1912 Act 8 s 42 – WLC 80.06

1912 GN 982 r 15 (Principles to Guide Water Courts) – WLC 80.05

1912 GN 982 r 16 (Principles to Guide Water Courts) – WLC 80.05

1912 GN 982 r 17 (Principles to Guide Water Courts) – WLC 80.16

Union Government v Zak River Estates 1918 Uys WLC 58 WC – WLC 80.11, WLC 80.12

BUCKLEY *Irrigation Pocket Book* ed 1913 p 229, 276, 281, 295, 300 – WLC 80.27, WLC 80.36, WLC 80.37, WLC 80.38

***Glaeser v Warren* 1921 Uys WLC 81 WC**

[WLC 81 NOTES]

Judgment Date 1921-07-26. **Court** WC (Zeerust). **Judge(s)** C JEPPE (Irrigation Judge).

Also reported as *Glaeser v Warren CS* Krummeck 372

Quick-Note

Servitude of aqueduct - Restitutio in integrum - Water Court Jurisdiction

Summary

Application for servitude of aqueduct

The water court has jurisdiction in a claim for restitution against judgments pronounced by itself, its predecessors, or by another water court.

In an action for restitutio in integrum, all parties who may be affected by the issue must be brought into court.

Restitutio in integrum may be claimed in defence as well as by way of action.

Sources Noted

1912 Act 8 s 34 – WLC 81.09

1917 Act 32 s 36 Magistrates Courts Act – WLC 81.10

Richards v. Meyers 1919 T 159 – WLC 81.11

Viljoen v Van Staden 1915 T 380 – WLC 81.10

VOET 4 1 1 – WLC 81.12

VOET 4 1 5 – WLC 81.08

VOET 4 1 8 – WLC 81.08

VON GLUCK 5 405 – WLC 81.07

VON SAVIGNY 1 215 – WLC 81.07

***Kaffir River Irrigation Board v Wessels* 1921 Uys WLC 82 WC**

[WLC 82 NOTES]

Judgment Date 1921-08-03. **Court** WC (Bloemfontein). **Judge(s)** JJ SCHEEPERS (Water Court Judge).

Also reported as *The Kaffir River Irrigation Board v Wessels and Another* Krummeck 376

Quick-Note

Servitude of storage – Compensation – Determining market value

Summary

In determining the value of the land to be submerged in an application for a servitude of storage, the value of the remainder of the farm should be ascertained, taking into account all inconvenience that may be caused by such deduction of the submerged portion, and this result being deducted from the present day market value of the whole farm would give the amount of compensation to be paid.

In determining the value of the farm, the court took into consideration the price realised for a portion of the same farm at a sale by public auction some two years back, and 5% was deducted from this, as according to the evidence land had depreciated in value since that date to that extent. This method was checked by capitalising the income the court found could be derived from farming operations on the farm and by the value of the rental.

On the question of general damage and inconvenience: HELD: The court should not confine itself absolutely to the market value.

Sources Noted

1912 Act 8 s 110(4) – WLC 82.03

1917 GN 459 r 21 (Water Court Rules) – WLC 82.35

1917 GN 459 r 22 (Water Court Rules) – WLC 82.24, WLC 82.35

1917 GN 459 r 24 (Water Court Rules) – WLC 82.35

***Witbank Municipality re Olifants River* 1921 Uys WLC 83 WC**

[WLC 83 NOTES]

Judgment Date 1921-08-26. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte The Witbank Municipality* Hall 1

Quick-Note

Surplus water.-Tertiary use - Contingent secondary use by lower owners

Summary

Application for permission to use surplus water of a public stream for primary purposes on non-riparian land.

Surplus water was urgently required for the development and support of important industrial enterprises. The objection was that the grant of permission for such use of the surplus water might, at some future time, adversely affect the rights of lower riparian owners to store the whole of that surplus water and to employ it for secondary riparian purposes.

HELD: The court granted permission for the tertiary use of a portion of a large stream of water which would otherwise run uselessly into the sea.

Such permission may even be granted in respect of non-riparian land, if the possibility was remote that the rights of lower riparian owners would be detrimentally affected.

Sources Noted

1912 Act 8 s 23 – WLC 83.01, WLC 83.03

Witbank Colliery Ltd re Olifants River 1921 Uys WLC 78 C – WLC 83.04, WLC 83.22

Bon Accord Irrigation Board v Pretoria Municipality (1) 1921 Uys WLC 84 WC

[WLC 84 NOTES]

Judgment Date 1921-09-12. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Bon Accord Irrigation Board v Pretoria Municipality (1)* Hall 6

Quick-Note

Riparian land – exclusive use of private water – concession to abstract public water not to interfere with riparian rights
– rights in respect of tributaries

Summary

A riparian owner of land is not entitled to the exclusive use of water arising on his own land when such water forms the source of a public stream.

The concession to a municipality to abstract water from a stream, does not entitle it to abstract water which lower riparian owners are entitled to claim in the exercise of their common law rights.

The question whether land is riparian or not, must be determined from the boundaries of the original title and cannot be affected by a subsequent Crown grant which includes land which was non-riparian under a prior grant.

Neither the normal flow nor the surplus water of a public stream may be diverted from riparian land for non-riparian use, nor may such water be used for tertiary purposes, except where permission has been given in respect of surplus water

The preferent rights of owners riparian to tributaries to the use of the water of such tributaries applies only to normal flow when once protection has been applied for.

Sources Noted

1894 TRANSVAAL Law 11 s 13 – WLC 84.14, WLC 84.25

1905 TRANSVAAL Ord 34 s 1 – WLC 84.16

1908 TRANSVAAL Act 27 s 44 (Irrigation) – WLC 84.07

1908 TRANSVAAL Act 27 [repealed Act 11 of 1894] (Irrigation) – WLC 84.25, WLC 84.26

1912 Act 8 s 2 “*riparian land*” – WLC 84.34

1912 Act 8 s 8 – WLC 84.04, WLC 84.07

1912 Act 8 s 10(4) – WLC 84.35, WLC 84.37

1912 Act 8 s 12 – WLC 84.37

1912 Act 8 s 14 – WLC 84.33

1912 Act 8 s 20 – WLC 84.33

1912 Act 8 s 23 – WLC 84.33

1912 Act 8 s 33 – WLC 84.31

1912 GN 982 r 7 (Principles to Guide Water Courts) – WLC 84.33

1912 TRANSVAAL Ord 9 s 72 (Local Government) – WLC 84.19

1912 TRANSVAAL Ord 9 s 73(2) (Local Government) – WLC 84.17

1912 TRANSVAAL Ord 9 s 156(12) (Local Government) – WLC 84.20

1917 GN 459 r 41 (Water Court Rules) – WLC 84.33

Du Plessis & De Villiers 1917 Uys WLC 47 WC – WLC 84.26

Grobler v Retief 1918 Uys WLC 59 WC – WLC 84.05

Meyer v Johannesburg Waterworks Co 1893 T (Hertzog) 1 – WLC 84.07

Rissik v Pretoria Municipal Council 1907 T 1026 – WLC 84.09, WLC 84.13, WLC 84.31

Smartt Syndicate Ltd v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 84.37

Smartt Syndicate v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 84.36

Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 84.07

DE VILLIERS JER *Water Law 1: The 8th Section [of Act 8 of 1912]*, in SALJ 1920 37 247 – WLC 84.05, WLC 84.06

DE VILLIERS JER *Water Law 3: The 8th Section [of Act 8 of 1912] again: public streams*, in SALJ 1921 38 13 – WLC 84.05, WLC 84.06

Union Government v Firth 1921 Uys WLC 85 C

[WLC 85 NOTES]

Judgment Date 1921-11-04. **Court** CPD. **Judge(s)** FG GARDINER

Also reported as *Union Government v Firth and Another* 1922 CPD 69

Quick-note

Irrigation rates – irrigation scheme including only some properties in irrigation district – properties within the scheme liable for ordinary rates – all properties in district liable for general rates – owner not objecting to rates at the time is now estopped – his mortgagee also estopped – irrigation rates are a preferent claim on insolvency as against mortgagee – Act 32 of 1906 s 46, 53, 56; Act 8 of 1912 s 70, 91, 93, 126.

Summary

An irrigation district was constituted under Act 32 of 1906. The board for the district put into force an irrigation scheme for the benefit of five of the owners of land within the district, the other owners electing not to participate.

The board levied rates on such owners only but failed to levy rates for three years and failed to repay Government loan.

The Minister of Finance then levied 3 years' rates on behalf of the board on all owners benefited by the scheme.

One owner became insolvent and a meeting of creditors, including the mortgagee, resolved to sell his land free of any restrictions. On application by the government to set aside this resolution;

HELD: (1) The irrigation scheme was not invalidated by the fact that it was for the benefit of some and not all of the property owners in the district.

(2) The levying of rates on the properties of the owners benefited by the scheme was not invalidated by the fact that –

(a) no general rate had been levied on all the properties in the district;

(b) the board had been elected only by the owners benefited by the scheme;

(c) no notice or an opportunity for objections, was given in accordance with the regulations.

(3) The rates for the three years had been lawfully levied by the Minister of Finance.

(4) The insolvent, having been a member of the board which carried out the scheme and having benefited by the scheme and by loans from the board and the government, was estopped from setting up the illegality of the scheme and of the rating under it.

(5) The burden of the rates imposed attached to the land and the mortgagee was also bound by the estoppel against the owner; the mortgage was therefore subject to the government's preference for irrigation rates to ss 70 and 93 of Act 8 of 1912.

(8) The resolution of the meeting of creditors to sell the insolvent's land free of conditions or restrictions was therefore invalid.

[This judgment was reversed on appeal to the full bench of the CPD – see below *Firth v Union Government* 1922 Uys WLC 93 C]

Sources Noted

1906 CAPE Act 32 s 43-46 – WLC 85.05

1906 CAPE Act 32 s 45 – WLC 85.28

1906 CAPE Act 32 s 46(1) – WLC 85.13

1906 CAPE Act 32 s 53 – WLC 85.20

1906 CAPE Act 32 s 55 – WLC 85.28

1906 CAPE Act 32 s 56 – WLC 85.20

1906 CAPE Act 32 s 56(1) – WLC 85.17

1906 CAPE Act 32 s 56(3) – WLC 85.17

1906 CAPE Act 32 s 115 – WLC 85.22

1912 Act 8 s 12 – WLC 84.37

1912 Act 8 s 70 – WLC 85.27

1912 Act 8 s 80(3) – WLC 85.28

1912 Act 8 s 90 – WLC 85.28

1912 Act 8 s 91 – WLC 85.20, WLC 85.31

1912 Act 8 s 93 – WLC 85.27

1912 Act 8 s 126 – WLC 85.30, WLC 85.31

1912 Act 8 s 132 – WLC 85.22

Maberley v Woodstock Municipality 1901 C (18 SC) 257 – WLC 85.21

Bon Accord Irrigation Board v Pretoria Municipality (2) 1921 Uys WLC 86 WC

[WLC 86 NOTES]

Judgment Date 1921-11-17. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Bon Accord Irrigation Board v Pretoria Municipality (2)* Hall 16

Quick-Note

Public water or private water – Test of capability of common use by riparian owners – riparian owner – application for protection – investigation of the nature of a stream.

Summary

Private water is the exclusive property of the owner of the land over which it flows. Lower owners can claim no right

to use it, nor can the public claim even the primary use of it.
The test to be applied in order to ascertain whether water is capable of common use by riparian proprietors is an economic one, based on environment, climatic conditions and the nature of the use.
The unit of common user is not the original grant of riparian land. Where a property which was the subject of an original grant has been sub-divided, a stream which is capable of common use, solely by the owners of these separate portions, can be declared a public stream.

Sources Noted

1908 TRANSVAAL Act 27 s 2 “riparian farm” – WLC 86.13
1908 TRANSVAAL Act 27 s 2 “riparian proprietor” – WLC 86.10
1912 Act 8 s 2 “owner” – WLC 86.14
1912 Act 8 s 2 “riparian farm” – WLC 86.13
1912 Act 8 s 2 “riparian owner” – WLC 86.09, WLC 86.11
Breyten Collieries Ltd v Dennil (2) 1913 Uys WLC 11 T – WLC 86.01
DE VILLIERS JER *Water Law 3: The 8th section [of Act 8 of 1912 again: Public streams]*, in SALJ 1921 38 13 – WLC 86.16

***Richter v Bloemfontein Town Council* 1921 Uys WLC 87 A**

[WLC 87 NOTES]

Judgment Date 1921-12-19. **Court** AD. **Judge(s)** J ROSE-INNES (Chief Justice), CG MAASDORP, J DE VILLIERS, HH JUTA (Judges of Appeal); JH LANGE (Acting Judge of Appeal)

Also reported as *Richter, Appellant v Bloemfontein Town Council, Respondent* 1922 AD 56

Quick-note

Right to dam river – includes the right to inundate properties – subject to agreement as to height of dam wall

Summary

In 1904 the Municipality took transfer from R of a portion of his riparian farm which the municipality intended to use for its municipal water scheme. The land was expropriated but the deed of settlement which provided for compensation, also provided for the transfer of “the water rights in and on the Modder river to which the portion of the farm hereby transferred is entitled, with the right to dam the river” with a 14 feet high wall and for the inundation of part of R’s higher riparian farm. In 1919 the Municipality raised the wall to 20 feet, resulting in a larger area of R’s higher farm being submerged.

R claimed compensation from the Municipality but the OPD held that the deed justified the heightening of the wall, since it was a necessary consequence of the right to dam the river – see *Richter v Bloemfontein Town Council* 1921 Uys WLC 72 O, above.

The Municipality appealed to the AD, which reversed the OPD decision, interpreting the deed to mean that the parties contemplated a definite weir of 14 feet high and that the Municipality had to pay damages for the results of the greater inundation of a 20 feet high wall.

Sources Noted

1872 OFS Law 11 [English law not applicable] (Law of Evidence) – WLC 87.65
1896 OFS Law 19 [expropriation for water works] (Bloemfontein Municipal Waterworks) – WLC 87.01, WLC 87.21, WLC 87.31, WLC 87.41, WLC 87.66, WLC 87.77, WLC 87.80, WLC 87.93, WLC 87.94, WLC 87.102
1896 OFS Law 19 s 3 (Bloemfontein Municipal Waterworks) – WLC 87.41, WLC 87.60
1899 OFS Law 1 s 8 (Expropriation) – WLC 87.02, WLC 87.69, WLC 87.94
1902 OFS Ord 12 s 62 (Criminal Procedure) – WLC 87.14
1907 OFS Ord 31 – WLC 87.105
Bank of New Zealand v Simpson 1900 AC 182 – WLC 87.18, WLC 87.86, WLC 87.100
North Eastern Railway Co v Hastings 1900 AC 260 – WLC 87.19
Roe v Siddons 1913 22 QB at 233 – WLC 87.64
Shore v Wilson 9 Cl & Fin 556, 8 ER 529 – WLC 87.15
FARNHAM *Law of Waters* par 546, 750, 567, 752 – WLC 87.55, WLC 87.56
TAYLOR *Evidence* 1194 – WLC 87.58
TAYLOR *Evidence* 1201 (ed 10) – WLC 87.85

***Poole’s Bay Village Management Board v Mossel River Estates Co Ltd* 1922 Uys WLC 88 WC**

[WLC 88 NOTES]

Judgment Date 1922-02-13. **Court** WC (Cape Town). **Judge(s)** JJ SCHEEPERS (Water Court Judge).

Also reported as *The Poole’s Bay Village Management Board v The Mossel River Estates Co Ltd* Hall 20

Quick-Note

Servitude - Use of water on non-riparian land.

Summary

Application for definition and recording of rights to water.

An owner of land which is partly riparian and partly non-riparian, was, in 1897, entitled to grant to the purchasers of non-riparian land a servitude of aqueduct over the riparian land and the right to use water from the river flowing

through such riparian land.

Sources Noted

[No sources were noted in the judgment]

Bon Accord Irrigation Board v Pretoria Municipality (3)

1922 Uys WLC 89 WC

[WLC 89 NOTES]

Judgment Date 1922-03-09. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Bon Accord Irrigation Board v Pretoria Municipality and Others (3)* Hall 22

Quick-Note

Protection - competitive claims to store surplus water - proportionate requirements against economic soundness of proposed schemes

Summary

Application for protection.

In considering competitive claims to rights to store surplus water under protection, the “proportionate requirements of each project” in respect of which protection is sought is not the only factor which the court should consider.

The chief purpose contemplated by the Act in dealing with the storage of surplus water is that of agriculture, and it is the duty of the court to consider the advantages which will be derived from its use. An important question to be considered is whether the works are practicable, i.e., economically sound. Where under a scheme the cost of irrigation per morgen of irrigable land is prohibitive, the court will not grant a share of the surplus water to that scheme in competition with other schemes which are economically sound.

[An agreement reached between parties was made an order of the supreme court – see *Pretoria Municipality v Bon Accord Irrigation Board* 1923 Uys WLC 94 T, below]

Sources Noted

1912 Act 8 s 14 – WLC 89.12

1912 Act 8 s 15 – WLC 89.12

1912 Act 8 s 16 – WLC 89.06

1912 Act 8 s 16(3) – WLC 89.12

1912 GN 982 r 11 (Principles to Guide Water Courts) – WLC 89.09

1912 GN 982 r 12 (Principles to Guide Water Courts) – WLC 89.09

1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 89.09

1912 GN 982 r 15 (Principles to Guide Water Courts) – WLC 89.09

1912 GN 982 r 15(b) (Principles to Guide Water Courts) – WLC 89.12

1912 GN 982 r 19(b) (Principles to Guide Water Courts) – WLC 89.13

1912 GN 982 r 20(h) (Principles to Guide Water Courts) – WLC 89.13

1912 GN 982 r 20(j) (Principles to Guide Water Courts) – WLC 89.13

1917 GN 459 r 46 (Water Court Rules) – WLC 89.03

Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 89.06

***Cape Portland Cement Co Ltd v Van Schalkwyk* 1922 Uys WLC 90 WC**

[WLC 90 NOTES]

Judgment Date 1922-04-27. **Court** WC (Piquetberg). **Judge(s)** JJ SCHEEPERS (Water Court Judge).

Also reported as *Cape Portland Cement Co Ltd v Van Schalkwyk and Others* Hall 26

Quick-Note

Tertiary use of normal flow – compensation

Summary

Application for permission to use normal flow for primary, secondary and tertiary purposes.

No compensation for abstraction of normal flow for tertiary use is payable if the abstraction of a small quantity of water does not prejudicially affect riparian proprietors.

The regulations provide that a defined quantity of normal flow taken from a public stream for tertiary purposes shall be returned to the stream as closely as possible to the point of diversion, without further loss than is occasioned by normal wastage during the legitimate use thereof. But it does not preclude the use of water for industrial purposes where the water will be consumed entirely and no portion thereof returned to the public stream.

Sources Noted

1892 CAPE Act 25 (Companies) – WLC 90.01

1912 Act 8 s 11 – WLC 90.16, WLC 90.17, WLC 90.21

1912 Act 8 s 11(4) – WLC 90.11

1912 Act 8 s 12 – WLC 90.18

1912 Act 8 s 21 – WLC 90.10, WLC 90.17, WLC 90.21

1912 Act 8 s 45(g)(ii) – WLC 90.11

1912 Act 8 s 101 – WLC 90.10

1912 GN 982 r 41 (Principles to Guide Water Courts) – WLC 90.10

1912 GN 982 r 44 (Principles to Guide Water Courts) – WLC 90.12
1912 GN 982 r 46 (Principles to Guide Water Courts) – WLC 90.13
1912 GN 982 r 46-51 (Principles to Guide Water Courts) – WLC 90.21
1912 GN 982 r 49 (Principles to Guide Water Courts) – WLC 90.10
1912 GN 982 r 51 (Principles to Guide Water Courts) – WLC 90.14, WLC 90.18
1912 GN 982 r 51(a) (Principles to Guide Water Courts) – WLC 90.19
1912 GN 982 r 51(b) (Principles to Guide Water Courts) – WLC 90.19
1912 GN 982 r 51(f) (Principles to Guide Water Courts) – WLC 90.20

***African Realty Trust Ltd v Holmes* 1922 Uys WLC 91 A**

[WLC 91 NOTES]

Judgment Date 1922-05-18. **Court** AD. **Judge(s)** J ROSE-INNES (Chief Justice), WH SOLOMON, J DE VILLIERS (Judges of Appeal)

Also reported as *African Realty Trust Ltd Appellant v Holmes Respondent* 1922 AD 389

Quick-note

Sale of riparian land – conditional on a planned dam to be constructed in river – plan altered – whether condition breached

Summary

H sold land to A on condition that the sale would lapse if the district irrigation board failed to carry out certain works “as now contemplated or as may be altered from time to time by the irrigation board.” The works contemplated at the date of the sale was the construction of a rock-fill storage dam and distribution canals estimated to cost £250000. Thereafter the irrigation board decided to substitute a concrete for a rock-fill dam, estimated to cost £450000. One result was an increase of the rates to be levied by the board under Act 8 of 1912 on the owners of land irrigated under the scheme.

The buyer repudiated the sale but both the CPD and the AD held against the buyer, on the ground that the contract allowed the works to be “altered” and that this was such an alteration and not a substitution of a different scheme for the dam originally planned.

Sources Noted

1912 Act 8 Chapter 6 – WLC 91.41
1912 Act 8 Chapter 8 – WLC 91.02
Winn v Bull 1878 7 ChD 29, LR 47 Ch 139 – WLC 91.14

***Bon Accord Irrigation Board re Aapies River* 1922 Uys WLC 92 WC**

[WLC 92 NOTES]

Judgment Date 1922-05-30. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge)

Also reported in *Pretoria Municipality v Bon Accord Irrigation Board* 1923 T 115 [on p 117-130, as an addendum to the TPD judgment]

Quick-note

Application to construct surplus water dam – claim for protection of existing dams – normal flow – apportionment

Summary

The Bon Accord Irrigation Board intended to construct a reservoir in the Aapies River to store surplus water and applied to the water court for an order (1) that the river was a public stream and (2) defining the quantity of surplus and normal flow water which the board and the riparian owners were entitled to.

The Pretoria municipality, within whose boundaries the Aapies River and certain tributaries arises, appeared before the water court and filed a declaration claiming protection for its reservoirs in the river system. The chief reservoir was the one in Skinner's Spruit. The water court granted protection to both the Bon Accord board and the municipality and apportioned certain quantities of surplus water to each.

The water court then gave its final order, by which it inter alia determined the normal flow of the Aapies river and apportioned it amongst the riparian owners of the three sections of its course. The first section was the municipal area from the river's source to the gauging weir at Daspoort; the second up to the intake of the Bon Accord Dam; and the third up to the junction of the Aapies and Pienaar rivers. The court also determined the daily quantity of the normal flow, which each section was entitled to use for primary purposes, but declared that this determination was open to revision on the application of any interested party.

Sources Noted

Long Title – WLC 92.24
1912 Act 8 Chapter 6 – WLC 92.24
1912 Act 8 Chapter 7 – WLC 92.24
1912 Act 8 Chapter 8 – WLC 92.24
1912 Act 8 s 4 – WLC 92.24
1912 Act 8 s 6 – WLC 92.24
1912 Act 8 s 7 – WLC 92.24

1912 Act 8 s 11 – WLC 92.01
 1912 Act 8 s 11(5) – WLC 92.05, WLC 92.06
 1912 Act 8 s 13 – WLC 92.24
 1912 Act 8 s 14 – WLC 92.13, WLC 92.24
 1912 Act 8 s 15 – WLC 92.24
 1912 Act 8 s 15(2) – WLC 92.32
 1912 Act 8 s 16 – WLC 92.24
 1912 Act 8 s 18 – WLC 92.33
 1912 Act 8 s 18(d) – WLC 92.24
 1912 Act 8 s 20 – WLC 92.34
 1912 Act 8 s 23 – WLC 92.34
 1912 Act 8 s 24 – WLC 92.24, WLC 92.35
 1912 Act 8 s 32(b) – WLC 92.28
 1912 Act 8 s 32(c) – WLC 92.24
 1912 Act 8 s 32(g) – WLC 92.31
 1912 Act 8 s 47 – WLC 92.24
 1912 Act 8 s 61(1)(b) – WLC 92.24
 1912 Act 8 s 99 – WLC 92.24
 1912 Act 8 s 100 – WLC 92.24
 1912 Act 8 s 132 – WLC 92.24
 1912 Act 8 s 133 – WLC 92.24
 1912 GN 982 r 3 (Principles to Guide Water Courts) – WLC 92.05, WLC 92.07
 1912 GN 982 r 3(c) (Principles to Guide Water Courts) – WLC 92.24
 1912 GN 982 r 3(d) (Principles to Guide Water Courts) – WLC 92.24
 1912 GN 982 r 5 (Principles to Guide Water Courts) – WLC 92.05, WLC 92.08, WLC 92.29
 1912 GN 982 r 8 (Principles to Guide Water Courts) – WLC 92.24
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 92.48, WLC 92.51
 1912 GN 982 r 18 (Principles to Guide Water Courts) – WLC 92.35
 1912 GN 982 r 19(b) (Principles to Guide Water Courts) – WLC 92.24
 1912 GN 982 r 22 (Principles to Guide Water Courts) – WLC 92.35
 1912 GN 982 r 27 (Principles to Guide Water Courts) – WLC 92.35
 1912 GN 982 r 40 (Principles to Guide Water Courts) – WLC 92.35
 1912 GN 982 r 41 (Principles to Guide Water Courts) – WLC 92.35
 1914 Act 18 Rand Water Board supplementary Water Supply) – WLC 92.38
 1914 Act 32 s 3 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 92.14, WLC 92.45
 1914 Act 32 s 3 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 92.43
 1914 Act 32 s 4 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 92.40
 1914 Act 32 s 11-12 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 92.39
 1914 Act 32 s 14 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 92.42
 1921 Act 24 s 10(b) (Durban Waterworks Consolidation) – WLC 92.40, WLC 92.44
Glatthaar v Rustenburg Municipality 1917-09-13 (UR) – WLC 92.02
Pietpotgietersrust Municipality v Amm 1914 Uys WLC 24 WC – WLC 92.02
Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 92.21
Union Government re Mooi River (1) 1915 Uys WLC 31 WC – WLC 92.02
 DE VILLIERS JER *Water Law 8: Riparian ownership: primary use of normal flow*, in SALJ 1922 39 p 4 – WLC 92.11, WLC 92.12

***Firth v Union Government* 1922 Uys WLC 93 C**

[WLC 93 NOTES]

Judgment Date 1922-10-10. **Court** CPD. **Judge(s)** MW SEARLE (Judge President), HS VAN ZYL, GG SUTTON

Also reported as *Firth v Union Government* 1923 CPD 3

Quick-note

Irrigation rates – preference against mortgagee – irrigation scheme not including all properties in district – constitution of irrigation district and board invalid – only properties included in “scheme” deemed indebted for government loan for works

Summary

An irrigation farmer went insolvent and his creditors resolved to sell his farm free of any restrictions. The government applied to the court to have the resolution set aside on the ground that the insolvent owed it irrigation rates which it levied on behalf of the irrigation board and that they were preferential charges on the property.

F, who held a bond over the property, opposed the government’s application. The court held in favour of the government (*Union Government v Firth* 1921 Uys WLC 85 C).

F now appealed to a full bench of the CPD. The appeal succeeded on the grounds –

- (1) that neither the irrigation district nor the irrigation board had been legally constituted;
- (2) that the advance by the government could not be regarded as an advance on the security of the rates levied on the land and therefore the government was not entitled to the preference conferred by the Act; and
- (3) F was not estopped from opposing the government’s claim.

Sources Noted

1906 CAPE Act 32 s 9 – WLC 93.11
 1906 CAPE Act 32 s 43 – WLC 93.05, WLC 93.14, WLC 93.34, WLC 93.35, WLC 93.36
 1906 CAPE Act 32 s 44 – WLC 93.34, WLC 93.35, WLC 93.36
 1906 CAPE Act 32 s 45 – WLC 93.21, WLC 93.34, WLC 93.35, WLC 93.36

1906 CAPE Act 32 s 46 – WLC 93.07, WLC 93.34, WLC 93.35, WLC 93.36
1906 CAPE Act 32 s 50 – WLC 93.11, WLC 93.16
1906 CAPE Act 32 s 53 – WLC 93.18
1906 CAPE Act 32 s 55 – WLC 93.11, WLC 93.21
1906 CAPE Act 32 s 56 – WLC 93.11
1906 CAPE Act 32 s 56(3) – WLC 93.20
1906 CAPE Act 32 s 57 – WLC 93.11, WLC 93.16
1912 Act 8 s 70(4) – WLC 93.02, WLC 93.26, WLC 93.32, WLC 93.42
1912 Act 8 s 85 – WLC 93.16
1912 Act 8 s 86 – WLC 93.16
1912 Act 8 s 93 – WLC 93.02, WLC 93.26
1912 Act 8 s 118 – WLC 93.41
1912 Act 8 s 119 – WLC 93.41
1912 Act 8 s 126 – WLC 93.13, WLC 93.30
1912 Proc 59 (Kaffirkuils Irrigation District constituted) – WLC 93.09

Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T

[WLC 94 NOTES]

Judgment Date 1923-01-04. **Court** TPD. **Judge(s)** AW MASON, JS CURLEWIS

Also reported as *Pretoria Municipality v Bon Accord Irrigation Board and Others* 1923 TPD 115

Quick-note

Normal flow of public stream – use by riparian owner for primary purposes – water court may not restrict – but court may restrict use for secondary purposes

Summary

This was an appeal by the Pretoria Municipality against a water court judgment of 30 May 1922 which apportioned the surplus water and the normal flow of the Aapies river system (see *Bon Accord Irrigation Board re Aapies River* 1922 Uys WLC 92 WC above).

The grounds of appeal were that the water court was not entitled (1) to treat the Bon Accord board preferentially in the apportionment of the surplus water, nor (2) to restrict the municipality's use of the normal flow of the river for primary purposes.

Dispute (1) – about the surplus water: was settled by agreement.

Dispute (2) – about the municipality's right to use the normal flow: HELD that the Irrigation Act 1912 and the common law recognised that a riparian owner has a preferent and exhaustive right to use the whole normal flow of a public stream for primary purposes, provided his use is not wasteful or uneconomical. The water court therefore had no right to interfere with such use by the municipality.

Sources Noted

1905 TRANSVAAL Ord 34 (Pretoria and Military Water Supply) – WLC 94.40
1912 Act 8 s 9 – WLC 94.10
1912 Act 8 s 10 – WLC 94.30
1912 Act 8 s 11 – WLC 94.11, WLC 94.14, WLC 94.18, WLC 94.21, WLC 94.25, WLC 94.26, WLC 94.31, WLC 94.36
1912 Act 8 s 11(6) – WLC 94.19
1912 Act 8 s 12 – WLC 94.18, WLC 94.21, WLC 94.25
1912 Act 8 s 13 – WLC 94.18, WLC 94.21
1912 Act 8 s 18 – WLC 94.25
1912 Act 8 s 20 – WLC 94.25
1912 Act 8 s 21 – WLC 94.18, WLC 94.19, WLC 94.21
1912 Act 8 s 23 – WLC 94.21
1912 Act 8 s 23(1) – WLC 94.20
1912 Act 8 s 32(b) – WLC 94.22, WLC 94.23
1912 Act 8 s 45(1)(g) – WLC 94.06, WLC 94.22, WLC 94.24
1912 GN 982 r 3 (Principles to Guide Water Courts) – WLC 94.12, WLC 94.14, WLC 94.31, WLC 94.36
1912 GN 982 r 5 (Principles to Guide Water Courts) – WLC 94.12, WLC 94.13, WLC 94.14, WLC 94.31, WLC 94.36
1912 GN 982 r 11-43 (Principles to Guide Water Courts) – WLC 94.28
1912 GN 982 r 39 (Principles to Guide Water Courts) – WLC 94.29
1912 GN 982 r 41-53 (Principles to Guide Water Courts) – WLC 94.29
1912 GN 982 r 49 (Principles to Guide Water Courts) – WLC 94.29
1912 GN 982 r 65-76 (Principles to Guide Water Courts) – WLC 94.30
1914 Act 18 (Rand Water Board Supplementary Water Supply) – WLC 94.33
1914 Act 32 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 94.34
1921 Act 24 s 10 (Durban Waterworks Consolidation) – WLC 94.35
DE VILLIERS JER *Water Law 8: Riparian ownership: primary use of normal flow*, in SALJ 1922 39 p 4 – WLC 94.09

Kock v Registrar of Deeds 1923 Uys WLC 95 C

[WLC 95 NOTES]

Judgment Date 1923-01-29. **Court** CPD. **Judge(s)** HS VAN ZYL

Also reported as *Kock v Registrar of Deeds* 1923 CPD 247

Quick-note

Irrigation charge – no preference over prior mortgage

Summary

Kock (the applicant) held a mortgage bond over a property of one Theunissen and the Government held two irrigation bonds which were registered after the mortgage bond.

Kock obtained judgment against Theunissen for the amount of his bond and at the execution sale Kock bought the property for less than the amount due to him under his bond.

But the Registrar of Deeds refused to register the transfer on the ground that the Act required proof of payment of the redemption charges on the irrigation loans and the consent of the Minister to the transfer.

Held: that an irrigation bond does not have preference over a prior mortgage bond.

Sources Noted

1912 Act 8 s 118(2) – WLC 95.06, WLC 95.07

1912 Act 8 s 122 – WLC 95.03, WLC 95.04, WLC 95.06, WLC 95.07

1912 Act 8 s 123 – WLC 95.02, WLC 95.03, WLC 95.04, WLC 95.07

1912 Act 8 s 125 – WLC 95.03

1916 Act 28 (Drought and Flood Distress Relief) – WLC 95.02, WLC 95.03

***De Beer v Van der Merwe* 1923 Uys WLC 96 A**

[WLC 96 NOTES]

Judgment Date 1923-02-28. **Court AD.** **Judge(s)** J DE VILLIERS (Judge of Appeal), HH JUTA, JG KOTZÉ (Judges of Appeal),

Also reported as *De Beer, Appellant v Van der Merwe, Respondent* 1923 AD 378

Quick-note

Diversion of rain water to lower property for more than 30 years – lower owner rented upper property – constitutes precario – prescription interrupted for such rental period – vetustas rule not applicable.

Summary

Whenever heavy rain fell (which seldom happened) in the area of a certain farm, the farmer constructed a soil embankment to prevent his house being flooded. The embankment diverted the water over his farm to the river. In 1884 he subdivided the farm and sold the portion which contained the lower part of the embankment. The upper owner and his successors continued to divert the water by means of the embankment over the lower property to the river.

In 1921 the water diverted by the embankment caused damage on the lower farm and the present lower owner (plaintiff) sued the present upper owner (defendant) for damages and an interdict against such diversion. The defence was that the embankment had been in existence for a period far exceeding that of prescription.

The court of appeal, after distinguishing the acquisition of rights by *vetustas* and by prescription –

HELD: (1) It is not possible to hold that the embankment was made so long ago that no one can remember when, or that it must be deemed to have had a lawful origin (*pro lege*), so as to make the doctrine of *vetustas* applicable to the facts of this case; and

(2) Since the upper owner (the alleged dominant tenement) was for a period of 10 years also the tenant of the lower farm (the alleged servient tenement), such owner had not during that period diverted the water adversely and as of right but by consent (*precario*) – which interrupted prescription – and that the defence of prescription must therefore also fail.

Plaintiff was therefore entitled to an interdict and damages.

Sources Noted

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 96.08, WLC 96.10, WLC 96.14, WLC 96.31

Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 96.14

D 23 2 1 3 – WLC 96.15

D 23 2 1 5 – WLC 96.15

D 23 2 1 7 – WLC 96.15

D 39 3 1 23 – WLC 96.15, WLC 96.32

D 39 3 1 26 – WLC 96.32

D 39 3 2 – WLC 96.12, WLC 96.14

D 39 3 2 1 – WLC 96.33

GOUDSMIT *Pandecten Systeem* 1 81 – WLC 96.13, WLC 96.15, WLC 96.16

PARDESSUS *Servitudes* 3 1 4 n 283 – WLC 96.23

PECKIUS *Servitudes* 2 under “*Servitudes urbanum*” 6 3 n 9 – WLC 96.32

POTHIER *Traité de la prescription: L'interruption naturelle* – WLC 96.23

PUCHTA *Vorlesungen* 77 – WLC 96.13

VOET 39 3 5 – WLC 96.13

VON SAVIGNY *Roman Law* 4 196 6 – WLC 96.13, WLC 96.14

WINDSCHEID *Lehrbuch des Pandektenrechts* 113 n 5 – WLC 96.13

Lindley Municipality re Valsch River 1923 Uys WLC 97 WC

[WLC 97 NOTES]

Judgment Date 1923-08-27. **Court** WC (Kroonstad). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Lindley Municipality* Hall 32

Quick-Note

Protection – part of catchment – fixing of normal flow in protection cases – primary requirements

Summary

Application for protection.

The court in a protection application is to fix limits to the area of notification after careful enquiry, But protection in respect of a limited portion of the catchment can be granted, provided it is made subject to the express condition that it is of no effect outside such limited area.

The determination of normal flow for the purpose of defining and dividing surplus water, is to precede the granting of protection.

Water required for primary use forms part of the normal flow.

It has been the practice when fixing and dividing normal flow to include primary requirements in the secondary supply and to fix the primary requirements of towns.

A riparian proprietor has a preferent exhaustive right to the whole of the water of a public stream for primary purposes and a water court has no right to interfere with such user.

A water court cannot define the normal flow without the consent of parties to incorporate their primary rights in the division. Without such consent, it cannot grant protection.

But the court can fix the quantity required for primary use at the moment when judgment is given, leaving it open to any interested party to apply later to any competent court for either a reduction or an increase of such quantity.

Sources Noted

1912 Act 8 s 16 – WLC 97.02

1912 Act 8 s 15 – WLC 97.03, WLC 97.13

1912 Act 8 s 16(2) – WLC 97.04

Bon Accord Irrigation Board re Aapias River 1922 Uys WLC 92 WC – WLC 97.17

Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 97.17

Glatthaar v Van Wyk (1) 1923 Uys WLC 98 WC

[WLC 98 NOTES]

Judgment Date 1923-09-28. **Court** WC (Rustenburg). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Glatthaar & Muller v Van Wyk and Others (1)* Hall 44

Quick-Note

Apportionment of water – subdivision of land entitled to servitude of aqueduct

Summary

Application for investigation, definition and apportionment of water.

A right of aqueduct was obtained and registered in favour of a certain property, part of which could be irrigated from the furrow, the remainder being non-irrigable land. The farm was subsequently sub-divided and the right of aqueduct was registered on the title deeds of all the subdivisions. In an application for apportionment of water, it was held that the deed of servitude must be interpreted to mean that only those persons, whose ground was so situated that it could be irrigated from the furrow, were entitled to a share of the water, and that the holder of land, which could not be so irrigated because it was inaccessible to water from the furrow, had no claim to a share of the water proportionate to the extent of his holding in relation to the original area of the whole property. The dominant tenement was that portion of the land which was designated in the deed as the land served by the furrow, and a right of servitude could not be divorced from the dominant tenement it served.

Although no evidence can be led to show what the intention of the parties, who entered into the deed, was, the Court can take into consideration for the purpose of construing the meaning of the document: (a) the surrounding circumstances which pertained at the time the document came into existence, and (b) the conduct of the contracting parties after it had come into existence.

[The judgment was taken on appeal to the TPD, which held on 24 November 1924 [unreported] that the water court's interpretation of the servitude was correct but that the rights of the remaining extent did not fall under the terms of the servitude but had to be fixed in terms of the Irrigation Act; it then sent the matter back to the water court for a division of the water [*Glatthaar v Van Wyk (2)* 1925 Uys WLC 109 WC]. A few months later the farm was again the subject of a TPD decision [*Glatthaar v Van Rensburg* 1925 Uys WLC 112 T] when it was disputed whether a proposal to lead the water by a pipe under the river to the opposite bank was within the terms of the servitude]

Sources Noted

Du Plessis and De Villiers 1917 Uys WLC 47 WC – WLC 98.11, WLC 98.14, WLC 98.56

VAN DERL LINDEN 1 9 4 8 – WLC 98.26

Jordaan v Black 1923 Uys WLC 99 WC

[WLC 99 NOTES]

Judgment Date 1923-11-27. **Court** WC (Worcester). **Judge(s)** HM LOUWRENS.

Also reported as *Jordaan v Black and Others* Hall 59

Quick-Note

Servitude of aqueduct and settlement of dispute in same application

Summary

A claim for servitudes of aqueduct and settlement of a dispute as to rights to water, was combined in the same application

The rights of owners to the use of water in a certain furrow were defined by a notarial agreement. The court refused to grant permission to an owner to divert water from the furrow in a manner contrary to the agreement without the consent of the owner of the servient tenement.

Sources Noted

1912 Act 8 Chapter 7 – WLC 99.03

1912 Act 8 s 101 – WLC 99.04

1912 Act 8 s 102 – WLC 99.05

Gardens Estate Ltd v Lewis 1920 AD 144 – WLC 99.12

Van Heerden v Coetzee 1914 Uys WLC 20 A – WLC 99.12

Van der Merwe v Hollins 1924 Uys WLC 100 WC

[WLC 100 NOTES]

Judgment Date 1924-04-29. **Court** WC (Potchefstroom). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Van der Merwe v Hollins* Hall 63

Quick-Note

Right to water – acquisition by prescription – constant use, quantity and velocity of flow.

Summary

Action for the apportionment of water and claim for prescriptive acquisition

For a claimant to establish a preferent right to the use of water for secondary purposes having been acquired by prescription, he must prove not only the continuous user of water, but the user of a definite quantity of water, determined by dimensions and velocity of flow in the furrow which carries the water.

Sources Noted

[No sources were noted in the judgment]

Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board 1924 Uys WLC 101 WC

[WLC 101 NOTES]

Judgment Date 1924-06-03. **Court** WC (Cape Town). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board and Others* Hall 65

Quick-Note

Application for protection - notification - Veld-flooding - Silting up of works – inclusion of municipalities in irrigation districts - permanent flow prescription - Calculation of annual flow –rainfall and run-off – proportionate division of surplus water

Summary

Application for protection. Held–

The applicant may select the limits within which he will serve notices on owners up-stream of his works but protection will only operate against owners served.

Certain townships fell within the area of protection, and substituted service on the municipalities was ordered., representing their inhabitants

Veld-flooding may only be practised where it will produce substantially beneficial results without waste.

If the capacity of dams and furrows becomes diminished through silting, the dimensions of the works may be increased subject to conditions as the court deems fit.

The water of a permanent stream which is useless for irrigation owing to its brackishness, cannot be regarded as “normal flow”.

All properties within the outside boundaries of an area proclaimed an irrigation district, form part of the proclaimed area of such district.

A municipality is liable for its proportionate share of the total expenditure of an irrigation board, without approval by the Administrator of its inclusion in the irrigation district.

An owner who used the whole of the permanent flow of a public stream for 30 years, is not entitled to an accession to the flow.

If rainfall is irregular, the quantity of surplus water available for apportionment is calculated on averages taken over a number of years, and not on the flow during individual years.

Sources Noted

1912 Act 8 s 10 – WLC 101.52
1912 Act 8 s 14 – WLC 101.24
1912 Act 8 s 15 – WLC 101.01, WLC 101.17
1912 Act 8 s 16 – WLC 101.01, WLC 101.17, WLC 101.123, WLC 101.131
1912 Act 8 s 16(1) – WLC 101.04, WLC 101.07, WLC 101.130
1912 Act 8 s 16(2) – WLC 101.27, WLC 101.55
1912 Act 8 s 18 – WLC 101.24
1912 Act 8 s 24 – WLC 101.43, WLC 101.45
1912 Act 8 s 24(a) – WLC 101.54
1912 Act 8 s 24(b) – WLC 101.37, WLC 101.55
1912 Act 8 s 32 – WLC 101.112
1912 Act 8 s 32(a) – WLC 101.71
1912 Act 8 s 63 – WLC 101.71
1912 Act 8 s 80 – WLC 101.93
1912 Act 8 s 81 – WLC 101.93
1912 Act 8 s 83 – WLC 101.81
1912 Act 8 s 86 – WLC 101.80
1912 Act 8 s 90 – WLC 101.81
1912 Act 8 s 133 – WLC 101.33
1912 GN 982 r 19(b) (Principles to Guide Water Courts) – WLC 101.36
1912 GN 1692(3) r 4 (Irrigation Boards) – WLC 101.80
1912 GN 1692 r 37 (Irrigation Boards) – WLC 101.81
1917 Proc 62 (Sundays River Irrigation District establishment) – WLC 101.02
1919 Proc 119 (Van Rynevelds Pass Irrigation District establishment) – WLC 101.76
1923 Act 35 Long Title (Financial Adjustments) – WLC 101.99
1923 Act 35 s 2 (Financial Adjustments) – WLC 101.97, WLC 101.100
1923 Act 35 s 4 (Financial Adjustments) – WLC 101.98, WLC 101.100
Smartt Syndicate 1923-03-03 C [UR] – WLC 101.140
Smartt Syndicate 1923-03-14 C [UR] – WLC 101.36

***Botha v Le Roux* 1924 Uys WLC 102 WC**

[WLC 102 NOTES]

Judgment Date 1924-06-27. **Court** WC (Cape Town). **Judge(s)** HM LOUWRENS.

Also reported as *Botha v Le Roux and Others* Hall 94

Quick-Note

Apportionment – river gaugings – technical evidence – costs

Summary

Application for the investigation, definition, and recording of rights to water

The general principle is that the general costs of an apportionment should be borne by all parties to the application.

Even if the evidence of gaugings is unnecessary, the court may regard it as material and the expenses of an engineer employed to take such gaugings will be treated as part of the general costs of the application.

Sources Noted

1912 Act 8 s 32(b) – WLC 102.01, WLC 102.04, WLC 102.10
1912 GN 982 r 1-10 (Principles to Guide Water Courts) – WLC 102.05
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 102.04
Cape Orchard Co v Conradie 1921 Uys WLC 75 WC – WLC 102.10
Parys Municipality 1917-04-05 WC [UR] – WLC 102.04
Reinstorffre Mozane Spruit 1914 Uys WLC 25 WC – WLC 102.04
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 102.10

***Woeke v Calitzdorp Irrigation Board* 1924 Uys WLC 103 C**

[WLC 103 NOTES]

Judgment Date 1924-08-21. **Court** CPD. **Judge(s)** HS VAN ZYL

Also reported as *Woeke and Others v Calitzdorp Irrigation Board* 1924 CPD 512

Quick-note

Irrigation board powers – notice of meeting – water apportionment unfair – jurisdiction of supreme court to interdict

Summary

The Calitzdorp irrigation board was given the power by Act 35 of 1923 to apportion water equally to each irrigated morgen of land in its area. The dam being at a low level, the board resolved to give water to the lower lands served by the bottom sluice, the higher lands to have no water until the dam fills up sufficiently to reach the upper sluice.

The owners of the upper lands obtained an interim interdict restraining the board from carrying the resolution into effect and requiring it to cause an equal quantity of water to be given to each morgen of land as laid down by the Act.

The board objected to the court's jurisdiction on the ground that Act 8 of 1912 gave the water court sole jurisdiction to determine water rights.

Held: (1) that the court had jurisdiction to interfere with the temporary arrangements resolved on by the board; but not to settle the permanent rights of the parties;

(2) that the resolution of the board was invalid in that insufficient notice of the meeting had been given and

(3) that the rule nisi, in so far as it dealt with resolutions passed at that meeting, should be made absolute.

Sources Noted

1923 Act 35 s 8 (Financial Adjustments) – WLC 103.02, WLC 103.10, WLC 103.12

1923 Act 35 s 6 (Financial Adjustments) – WLC 103.02

1923 Act 35 s 8(3) (Financial Adjustments) – WLC 103.03, WLC 103.04, WLC 103.06

1916 Act 26 (Irrigation Amendment Act) – WLC 103.07

1912 GN 1692(3) r 25 (Irrigation Boards) – WLC 103.13

***Louw v Dorman* 1924 Uys WLC 104 WC**

[WLC 104 NOTES]

Judgment Date 1924-12-02. **Court** WC (Cape Town). **Judge(s)** HS VAN ZYL.

Also reported as *Louw v Dorman and Others* Hall 96

Quick-Note

Public stream - Known and defined channel - Disappearance of stream - Underground channel - Riparian rights to tributary and to main stream - Interference with water in furrow - Sale without water rights

Summary

Application for the investigation, definition and recording of rights to water.

If water flows in an underground channel it is not necessary that the exact depth and position of that channel should be ascertainable, provided its position is known within narrow practical limits.

Property which is riparian to a public stream is also riparian to a tributary of that stream, when that tributary is a public stream, but is not entitled to the water of the tributary in competition with owners who are riparian solely to the tributary.

Sources Noted

1912 Act 8 s 2 "public stream" – WLC 104.07, WLC 104.14, WLC 104.17, WLC 104.18, WLC 104.19

1912 Act 8 s 8(1) – WLC 104.06, WLC 104.07

1912 Act 8 s 10(4) – WLC 104.28

1912 Act 8 s 32(b) – WLC 104.01

1916 Act 26 s 2 – WLC 104.01, WLC 104.07

Brouwer v De Wit 1908 C (25 SC) 801 – WLC 104.27

Ohlsson's Cape Breweries Ltd v Artesian Well-boring Co Ltd 1919 Uys WLC 66 C – WLC 104.15

***Transvaal & SA Land Trust Ltd v Roux* 1925 Uys WLC 105 WC**

[WLC 105 NOTES]

Judgment Date 1925-01-31. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Transvaal and South Africa Land Trust Ltd v Roux* Hall 104

Quick-Note

Costs – obtaining information – gaugings by owners

Summary

Application for the award of special costs.

An order for qualifying expenses and other costs incidental to the gaining of information required in a future action should only be granted when it is quite clear that the information is essential to the defence, and could not have been obtained in any other way.

The court will not permit the inclusion, in the taxed costs of an action, of expenditure incurred by individual owners in obtaining independent gaugings and general surveys.

Sources Noted

1912 Act 8 s 23 – WLC 105.11, WLC 105.12

1912 GN 1692(1) r 1 (Water Court Rules) – WLC 105.06

1912 GN 1692(1) r 18 (Water Court Rules) – WLC 105.06

West End Farms & Ranch Co Ltd 1925 Uys WLC 106 WC

[WLC 106 NOTES]

Judgment Date 1925-04-29. **Court** WC (Pretoria). **Judge(s)** C JEPPE {Water Court Judge}.

Also reported as *Ex parte West End Farms and Ranch Co Ltd* Hall 112

Quick-Note

Surplus water – protection – amendment of declare notices.

Summary

Application for the amendment of an order of court made for preliminary protection proceedings

Due to a clerical error, an application for protection stated the storage capacity of certain water works to be much less than was actually the case, and the error was perpetuated in the order of court and the declare notices.

Held, that the record could be amended by the substitution of the larger amount of water stored for the less and that the application could be granted ex parte, service on such owners as had appeared at the preliminary hearing being ordered.

Sources Noted

1912 Act 8 s 16(1) – WLC 106.02

Nylstroom Village Council re Klein Nyl 1925 Uys WLC 107 WC

[WLC 107 NOTES]

Judgment Date 1925-05-25. **Court** WC (Nylstroom). **Judge(s)** C JEPPE {Water Court Judge}.

Also reported as *Ex parte Nylstroom Village Council* Hall 113

Quick-Note

Protection – consent of all riparian owners within area. – Notice

Summary

Application for protection: Preliminary inquiry

An applicant for protection obtained the consent to the granting of a protection order from all the riparian owners within the area to which the order would apply and applied to the court to grant the order forthwith. Held –

Application refused notice was not published beforehand. The applicant had to notify owners below the storage works to appear at the next hearing to claim their share of the normal flow, in order for the court to fix normal flow at the point of storage.

Sources Noted

1912 Act 8 s 13 – WLC 107.19

1912 Act 8 s 16(1) – WLC 107.14

1912 Act 8 s 16(6) – WLC 107.16

Nylstroom Village Council v Van Deventer 1925 Uys WLC 108 WC

[WLC 108 NOTES]

Judgment Date 1925-06-23. **Court** WC (Nylstroom). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Nylstroom Village Council v Van Deventer and Others* Hall 117

Quick-Note

Servitude of abutment – whether includes storage – “dam” and “weir” not synonymous.

Summary

Application for servitudes of abutment and storage

Property was bequeathed subject to fideicommissary rights, restricting alienation in favour of future generations, but the court has power to grant servitudes of storage over such property, on the principle that no act of the owners of a farm can defeat the statutory rights of other property owners.

The court may grant a servitude of abutment, even if the work which is to be constructed is intended for the diversion of water and for its storage.

The words “dam” or “weir” contained in s 105(1) are not synonymous: “weir” means an obstruction diverting the course of the stream and “dam” can only be a storage dam.

The Act authorises the erection of storage works by one riparian proprietor on the property of another and this right carries with it the onerous right of submersion, subject to the payment of adequate compensation.

Glatthaar v Van Wyk (2) 1925 Uys WLC 109 WC

[WLC 109 NOTES]

Judgment Date 1925-06-27. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Glatthaar & Muller v Van Wyk and Others* (2) Hall 125

Quick-Note

Water furrow – includes pipe

Summary

A servitude granted to certain riparian owners the right to lead water onto their riparian land by means of a furrow and to make extensions and diversions of the furrow for this purpose. A riparian owner sought to convey his share of the water of the furrow across the river by means of a pipe for use on riparian land across the stream.

Held, that a pipe could be substituted for a furrow cut out of the soil, and that a pipe diverting water across the river could be regarded as an extension or diversion of the original furrow.

A furrow remains one and the same furrow, as long as there is only one point of diversion from the stream.

Sources Noted

Smith v Smith (2) 1914 Uys WLC 22 A – WLC 109.06

***Smit v Motsepe* 1925 Uys WLC 110 A**

[WLC 110 NOTES]

Judgment Date 1925-10-06. **Court** AD. **Judge(s)** J ROSE-INNES (Chief Justice), WH SOLOMON, J DE VILLIERS, JG KOTZÉ, JW WESSELS (Judges of Appeal)

Also reported as *Smit and Others, Appellants v Motsepe, Respondent* 1926 AD 28

Quick-note

Dry season water of public stream – would not reach lower property – upper owner may therefore use all the water – even for secondary purposes

Summary

A riparian owner on a public stream got an order from the water court restraining the upper owners from using the water for secondary purposes. The water court found that the dispute related only to the dry winter flow of the stream, which was in any case insufficient to reach the lower property and was useless to anyone but the owners of the upper property. It nevertheless apportioned the water between the parties.

On appeal, the TPD affirmed the judgment of the water court and consented that the matter be referred back to the water court to apportion the surplus flow.

On appeal to the AD, the order of the water court was set aside and the decision of the TPD was reversed, on the ground that the lower owner had failed to prove that they were being wrongfully deprived of the primary use of the water of the stream, since the dry season flow would not have reached the lower property.

Sources Noted

1912 Act 8 s 32(1) – WLC 110.03, WLC 110.26

1912 Act 8 s 32(2) – WLC 110.03, WLC 110.04, WLC 110.26

1912 GN 1692(1) r 37 (Water Court Rules) – WLC 110.03

1916 Act 26 s 2 (Irrigation Amendment) – WLC 110.04

***Imperial Cold Storage & Supply Co Ltd v Kaplan* 1925 Uys WLC 111 WC**

[WLC 111 NOTES]

Judgment Date 1925-10-26. **Court** WC (Cape Town). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Imperial Cold Storage & Supply Co Ltd v Kaplan* Hall 128

Quick-Note

Servitude of aqueduct - Insertion of conditions in favour of servient tenement - Costs

Summary

Application for acquisition of a servitude of aqueduct

In an application for a servitude of aqueduct, the servient owner may claim the imposition of conditions such as fencing, prevention of seepage, provision of crossings, and the costs which he has reasonably incurred in getting legal and technical assistance.

Sources Noted

[No sources were noted in the judgment]

***Glatthaar v Van Rensburg* 1925 Uys WLC 112 T**

[WLC 112 NOTES]

Judgment Date 1925-12-24. **Court** TPD. **Judge(s)** JS CURLEWIS (Judge President), BA TINDALL

Also reported as *Glatthaar v Van Rensburg* 1926 TPD 249

Quick-note

Servitude registration – aqueduct– 1912 Act 8 s 32

Summary

The Sterkstroom river flows through the farm K. The part of K on the left bank was subdivided into 82 portions (called “water erven”) which were irrigated from a furrow which led water from a dam higher up the river. The owners of the right bank (the “remaining extent” of K) now wanted to subdivide it and irrigate the portions from the furrow by leading the water from the furrow by a pipe under the river to the right bank.

The left-bank owners disputed this on the grounds –

- (1) that a 1915 servitude against the title deeds of all the subdivisions allowed “deviations” and “extensions” of the furrow which, they alleged, means that only those portions below the furrow are entitled to be irrigated by gravity and that a pipe under the river is not a deviation or extension of the furrow;
- (2) that when the river’s water was in 1917 apportioned to K and other riparian farms on the basis of the irrigable land of each farm, the owners of K told the surveyor only about the area of the land which was actually irrigated at the time, namely the 82 water erven on the left bank, with the result that the right bank owners are now estopped from claiming any furrow water.

The dispute went to the water court and then to the supreme court for a re-interpretation of the servitude. It then went back to the water court where the owners of the original 6 subdivisions introduced a new matter, namely that an additional servitude of 1884 in their title deeds entitled them to “free water from the furrow provided it does not harm lower erven” and that this servitude gave them a preferent right to the water.

The water court agreed with the interpretation of the 6 owners and apportioned to them a minimum quantity of water and divided the balance of the water among the other owners. Against this judgment the appellant appealed to the TPD on various grounds and the respondent cross-appealed on various grounds. HELD –

- (a) that the 1917 apportionment of water to the farm K was to the farm as a whole and not to the individual portions of the farm: the owners of the remaining extent were therefore not estopped from claiming against the owners of the other portions a share of the water allowed for the whole farm.
- (b) that siphoning water through a pipe across a river was not contrary to the 1915 servitude, because it was in effect still leading water by gravitation.
- (c) the 1884 servitudes in the title deeds of the 6 original water erven did not entitle them to preference.
- (d) the right bank of the farm K will be entitled to 49% of the furrow water to be divided between the new subdivisions when they are registered.

Sources Noted

1912 Act 8 s 32(a) – WLC 112.01

1912 Act 8 s 32(b) – WLC 112.01

1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 112.11, WLC 112.12, WLC 112.44

1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 112.32

***De Wet v Vermeulen* 1926 Uys WLC 113 C**

[WLC 113 NOTES]

Judgment Date 1926-01-20. **Court** CPD. **Judge(s)** LE BENJAMIN, HM LOUWRENS

Also reported as *De Wet v Vermeulen* 1926 CPD 155

Quick-note

Water rights – jurisdiction of magistrate's court –bona fide dispute

Summary

P alleged in the magistrates’ court that he had an exclusive right of aqueduct by 2 furrows over D’s land and that D unlawfully diverted water from the furrows and he claimed damages for the loss of water which he needed for irrigation.

D denied Ps’ claim to the exclusive use of the water in the furrows and objected to the magistrate’s jurisdiction on the ground that it was a dispute about water rights, over which the water court had sole jurisdiction in terms of s 34(1) of Act 8 of 1912. The magistrate allowed D’s objection although no evidence was led to show that D’s plea was bona fide.

On appeal by P, the CPD upheld the magistrate’s decision and refused to refer the matter back to the magistrate for the purpose of hearing such evidence.

Sources Noted

1912 Act 8 s 32 – WLC 113.07

1912 Act 8 s 34 – WLC 113.11

1912 Act 8 s 34(1) – WLC 113.05

1916 Act 26 (Irrigation Amendment Act)– WLC 113.06

Dorman v Louw 1921 Uys WLC 78 C – WLC 113.12, WLC 113.13

Le Roux v Du Plessis 1912 Uys WLC 9 C – WLC 113.11

Swart v Gordons Bay Village Management Board 1918 JDR 92 – WLC 113.11

Van der Vyver v Marais 1914 Uys WLC 30 C – WLC 113.11

Van Heerden v Smit 1915 Uys WLC 36 C – WLC 113.01

Webb v East London Municipality 1917 JDR 216 – WLC 113.11

***Stroh v Cellier* 1926 Uys WLC 114 WC**

[WLC 114 NOTES]

Judgment Date 1926-05-12. **Court** WC (Pretoria). **Judge(s)** C JEPPE.

Also reported as *Stroh and Another v Cellier* Hall 130

Quick-Note

Right to runoff (afloop) water – upper owner may use all his water – reasonable use

Summary

A servitude granted a lower owner (S) the right to run-off (afloop) water, entitling him to such water as the upper owner (C) cannot use beneficially on his land. C constructed an irrigation dam (leidam) to irrigate additional land on his farm, which reduced the run-off flowing down to S. S objected to the water court.

Held: An *irrigation dam* (leidam) is constructed for temporary storage, usually at the lower end of a furrow, to store an owner's full quota for later use. A *storage dam* is a weir in the channel of a river for permanent storage.

Held: The upper owner is entitled to the reasonable use of all his allowed water; he may irrigate as much land as he wishes; he need not let any water flow down; it was not proved that he wasted any water.

Sources Noted

1912 GN 982 r 3 (Principles to Guide Water Courts) – WLC 114.20

Du Toit v Wendover 1912-06-26 T [UR] – WLC 114.21

Mapochsgronden Streams 1917 Uys WLC 50 WC – WLC 114.57

Nolan v Barnard 1908 T 142 – WLC 114.22, WLC 114.28, WLC 114.59

DE VILLIERS JER *Water Law 10: Secondary use of normal flow further considered*, in SALJ 1922 39 276 – WLC 114.20

JUTA *Water Rights* p 185 – WLC 114.19

***Phillips v Muller* 1926 Uys WLC 115 WC**

[WLC 115 NOTES]

Judgment Date 1926-06-12. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Phillips v Muller and Others* Hall 147

Quick-Note

Use of water on non-riparian land – in exchange for use on riparian land – 1912 Act 8 s 21, 23.

Summary

P applied for permission to use the water of a public stream for primary and secondary purposes on non-riparian land.

HELD: It was proved that the water of the stream is sufficient for the secondary requirements of the land riparian to it.

HELD: The Irrigation Act, 1912, does not provide for the exchange of riparian user for non-riparian user; but it allows a riparian owner to exchange his rights to secondary use for rights to tertiary use; tertiary use is a deferred use; therefore an exchange as applied for, should by analogy be allowable.

Sources Noted

1912 Act 8 s 21 – WLC 115.08

1912 Act 8 s 23 – WLC 115.02, WLC 115.05

1912 GN 982 r 51(g) (Principles to Guide Water Courts) – WLC 115.08

***Dutch Reformed Church of Redelinghuis v Roux* 1926 Uys WLC 116 WC**

[WLC 116 NOTES]

Judgment Date 1926-06-25. **Court** WC (Cape Town). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Dutch Reformed Church of Redelinghuis v Roux* Hall 150

Quick-Note

Rectification of title deed – water court order to register servitude

Summary

Certain land was sold by the owner subject to a servitude in favour of the remainder of the seller's property to the effect that the water of a spring on the portion sold, should be allowed to flow undisturbed in a furrow over that property to the remainder, the owner of which should maintain and have access to, the furrow.

Applicants thereafter purchased from the same seller a portion of the remainder, the dominant tenement, together with rights to a defined share of the water, but through an omission in the Deeds Office, no endorsement of the applicant's right of servitude was effected on the title of the remaining extent of the land still held by the seller.

The remaining extent was subsequently sold without any record being made in the deeds of the purchasers as to the existence of applicant's water rights and the respondent, who became the owner of that portion of the remainder over

which applicant's furrow ran, broke the furrow down and used water from it. Applicants claimed that registration of the servitude on the transfer deed of the servient tenement should be ordered or alternatively rectification of the existing deed. Held: The water court has jurisdiction to grant rectification of title when such rectification consisted merely in the registration of a servitude against such title. A mere "claim to water rights" is sufficient to found jurisdiction in the water court.

Sources Noted

1912 Act 8 s 32 – WLC 116.10
1912 Act 8 s 32(a) – WLC 116.10
1912 Act 8 s 34 – WLC 116.10, WLC 116.15
1912 Act 8 s 41 – WLC 116.10, WLC 116.11
1912 Act 8 s 66 – WLC 116.13
1916 Act 26 (Irrigation Amendment) – WLC 116.22
De Wet v Vermeulen 1926 Uys WLC 113 C – WLC 116.15

***De Wet v Estate Rossouw* 1926 Uys WLC 117 WC**

[WLC 117 NOTES]

Judgment Date 1926-07-20. **Court** WC (Cape Town). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *De Wet v Estate FJ Rossouw* Hall 156

Quick-Note

Water of riparian property with quota used on riparian property without quota

Summary

The water of a public stream was apportioned between riparian owners. One of them used his share on riparian land which was not included in the apportionment. He applied for a servitude of aqueduct over other owners' land.

Held: If an owner of sub-divided riparian land parts with his rights to water to which its ownership entitles him, he cannot claim to participate in its subsequent apportionment.

Held: Riparian land may use water obtained from another owner.

Held: An owner may claim compensation for a servitude of aqueduct over his land.

Sources Noted

1912 Act 8 s 2 "public stream" – WLC 117.13
1912 Act 8 s 2 "riparian land" – WLC 117.04, WLC 117.05
1912 Act 8 s 12 – WLC 117.12
1912 Act 8 s 45(1)(g)(i) – WLC 117.15
1912 Act 8 s 66 – WLC 117.14
1912 Act 8 s 102 – WLC 117.01, WLC 117.03
1912 Act 8 s 108 – WLC 117.27, WLC 117.54
1912 Act 8 s 110(2) – WLC 117.51
1912 Act 8 s 110(4) – WLC 117.42, WLC 117.50
1912 GN 982 (Principles to Guide Water Courts) – WLC 117.15
1912 GN 982 r 5 (Principles to Guide Water Courts) – WLC 117.16
1912 GN 982 r 6 (Principles to Guide Water Courts) – WLC 117.17
1912 GN 982 r 7 (Principles to Guide Water Courts) – WLC 117.18
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 117.19, WLC 117.22
1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 117.20
1912 GN 982 r 18 (Principles to Guide Water Courts) – WLC 117.21
1912 GN 982 r 21 (Principles to Guide Water Courts) – WLC 117.21
1912 GN 982 r 35(d) (Principles to Guide Water Courts) – WLC 117.22
1912 GN 982 r 35(e) (Principles to Guide Water Courts) – WLC 117.22
1912 GN 982 r 51(j) (Principles to Guide Water Courts) – WLC 117.22
1913 GN 987 (Water Servitudes) – WLC 117.59
Kaffir River Irrigation Board v Wessels 1921 Uys WLC 82 WC – WLC 117.52

***Sundays River Irrigation Board v Dunbrody Mission* 1926 Uys WLC 118 E**

[WLC 118 NOTES]

Judgment Date 1926-07-23. **Court** EDL. **Judge(s)** TL GRAHAM (Judge President), FJW VAN DER RIET, W PITTMAN

Also reported as *Sundays River Irrigation Board v Dunbrody Mission and Union Government* 1926 EDL 358

Quick-note

Irrigation board – claim for rates – failure of board to supply water to riparian land – damages; whether *ultra vires* to contract with other party to supply water; duty to determine irrigable areas – areas wrongly determined – amendment of schedule – abatement of water rates – water to non-riparian land

Summary

An irrigation board claimed water rates from a riparian owner. The owner denied that he was liable for rates because he obtained his water from private canals and not from the board; the board had caused the canals to be closed; and the

board had in any case over-estimated the owner's irrigable and rateable morgen. The owner moreover counter-claimed for his survey expenses to determine his correct irrigable area, for damages due to loss of sales as a result of the non-supply of water, and for an order obliging the board to supply water to the owner. The judgment was mainly about the interpretation of a contract between the landowner and the owner of the canals, and a contract between the board and the statutory Company set up to control the Mentz dam on the Sundays river. The outcome was that the riparian owner had to pay a reduced water rate, and that the board was ordered to supply water to the owner.

Sources Noted

1912 Act 8 Chapter 8 – WLC 118.152
1912 Act 8 s 34 – WLC 118.138
1912 Act 8 s 61(2) – WLC 118.114
1912 Act 8 s 62 – WLC 118.114
1912 Act 8 s 67 – WLC 118.31
1912 Act 8 s 75 – WLC 118.115
1912 Act 8 s 82(1) – WLC 118.11
1912 Act 8 s 89 – WLC 118.66, WLC 118.70, WLC 118.111
1912 Act 8 s 89(1) – WLC 118.64
1912 Act 8 s 89(2) – WLC 118.11, WLC 118.64, WLC 118.87, WLC 118.89, WLC 118.92
1912 Act 8 s 90 – WLC 118.27, WLC 118.152
1912 Act 8 s 91 – WLC 118.117, WLC 118.149
1912 Act 8 s 91(2) – WLC 118.17, WLC 118.65, WLC 118.117
1912 Act 8 s 91(3) – WLC 118.117, WLC 118.120
1912 Act 8 s 92 – WLC 118.17, WLC 118.149
1912 Act 8 s 93 – WLC 118.148
1912 Act 8 s 103 – WLC 118.122
1912 GN 982 r 6 (Principles to Guide Water Courts) – WLC 118.114
1912 GN 1692(3) r 37 (Irrigation Boards) – WLC 118.15, WLC 118.25, WLC 118.28, WLC 118.46, WLC 118.155
1912 GN 1692(3) r 38 (Irrigation Boards) – WLC 118.20, WLC 118.28, WLC 118.151
1917 Act 18 (Irrigation Works (Special Loans)) – WLC 118.06
1923 Act 35 s 2 (Financial Adjustments) – WLC 118.153, WLC 118.154
1923 Act 35 s 4 (Financial Adjustments) – WLC 118.152
1925 Act 15 s 2(1) (Sundays River Settlements Administration) – WLC 118.59, WLC 118.87
1925 Act 15 Schedule 1 (Sundays River Settlements Administration) – WLC 118.03, WLC 118.47, WLC 118.51
Olivier v Fourie 1899 C (16 SC) 304 – WLC 118.113
Venter v Rex 1907 TPD 910 – WLC 118.154

***Trakman v Withers* 1926 Uys WLC 119 T**

[WLC 119 NOTES]

Judgment Date 1926-08-13. **court** TPD. **Judge(s)** J STRATFORD, BA TINDALL

Also reported as *Trakman v Withers and Bates* 1926 TPD 632

Quick-note

Riparian owners – D entering P's property without consent to raise dam wall in river – P's land inundated – claim for damages in magistrate's court– objection to jurisdiction – alleged servitude – “dispute as to water rights” — magistrate to ascertain truth of allegation – 1912 Act 8 s 34

Summary

P was a riparian owner with a dam in the river on his property. D (who was also a riparian owner and was entitled to water from the dam) entered P's property without consent and proceeded to take stone and soil from his property to repair the dam wall. In the process the wall was slightly raised, resulting in part of P's land being flooded. P claimed damages in the magistrates' court.

D pleaded a servitude to the dam water and therefore the right to take materials and repair the wall. D also took the preliminary objection that P's claim would involve a decision on a dispute as to water rights, on which only a water court had jurisdiction in terms of s 34 of Act 8 of 1912. After hearing evidence the magistrate upheld the objection in so far as the claim for inundation was concerned but dismissed it as regards the claim for removal of materials. Plaintiff appealed.

The TPD upheld the appeal: the summons did not show that there was a dispute as to water rights and a mere allegation by P that he had such rights was insufficient to prove such dispute: the magistrate should first have heard evidence to prove D's allegation. The court therefore referred the matter back to the magistrate to hear such evidence and to decide the objection afresh.

Sources Noted

1912 Act 8 s 34 – WLC 119.01, WLC 119.12
De Wet v Vermeulen 1926 Uys WLC 113 C – WLC 119.17
Dorman v Louw 1921 Uys WLC 78 C – WLC 119.17

Holmes v Salzmänn (2) 1926 Uys WLC 120 O

[WLC 120 NOTES]

Judgment Date 1926-08-25. **Court** OPD. **Case No** 409/1926. **Judge(s)** JER DE VILLIERS (Judge President), HF BLAINE

Also reported as *Holmes Bros v Estate Salzmänn* 1926 OPD 236

Quick-note

Irrigation canal – unlawful diversion – insufficient proof of quantity of water diverted – nominal damages for loss of water – Costs affected by failure to complain to irrigation board or to use Irrigation Act remedy

Summary

H alleged that S obstructed an irrigation canal of the Kaffir River Irrigation district where it traversed H's farm. S's employees sometimes placed an iron sheet in the canal, thereby diverting H's water to S's farm. After this happened for some months, H sued for damages in the OPD.

HELD: The quantity of water so diverted was not proved and therefore merely nominal damages of £2 is awarded.

HELD: H had not complained to S or to the Irrigation Board about the obstruction nor used the easy and summary remedy under s 133 of the Act; therefore each party should bear their own costs.

Sources Noted

1912 Act 8 s 133 – WLC 120.07, WLC 120.11

Reed v Eddles 1920 OPD 69 – WLC 120.03

Wheeldon v Moldenhauer 1910 EDL 97 – WLC 120.03

Herzenberg Mullne Ltd v Cape Town Council 1926 Uys WLC 121 C

[WLC 121 NOTES]

Judgment Date 1926-09-30. **Court** CPD. **Judge(s)** LE BENJAMIN, EF WATERMEYER

Also reported as *Herzenberg Mullne Ltd v Cape Town Council* 1926 CPD 451

Quick-note

Municipality – Road construction – Alteration of natural flow of storm-water – Failure to clean storm-water drains – Flooding premises – damages

Summary

H, the owner of premises adjoining certain roads within the C municipality, alleged that in constructing the roads C had altered the natural flow of storm-water thereby throwing an additional burden on H's property unless the water were carried off by drains; that C had negligently, and in breach of obligations imposed by the Municipal Ordinance, allowed the drains to become obstructed with rubbish with the result that the premises were flooded with storm-water.

HELD: Having altered the natural flow of storm-water, C was bound to provide a system for carrying away the water and to keep such system in proper order; but that no such duty was imposed by the Municipal Ordinance.

Sources Noted

1912 CAPE Ord 10 s 287 (Cape Municipal) – WLC121.03, WLC 121.08, WLC 121.09, WLC 121.10, WLC 121.14

Reid v Van der Merwe 1926 Uys WLC 122 T

[WLC 122 NOTES]

Judgment Date 1926-12-10. **Court** TPD. **Judge(s)** L GREENBERG, JHFERC GEY VAN PITTIUS

Also reported as *Reid & Others v Van der Merwe & Others* 1927 TPD 182

Quick-note

Water court – power to order erection of water gauges – no power to order river board to control water distribution

Summary

In 1915 the water court apportioned the water of the Mooi river [1915 Uys WLC 32 WC]. In 1926 the court gave directions as to the quantities to which certain riparian owners were entitled, the measurement thereof, and the places where they could divert water. Some owners appealed on the ground that the river board and not the water court had to decide these matters. The court upheld their appeal.

Sources Noted

1912 Act 8 s 32 – WLC 122.07

1912 Act 8 s 32(a) – WLC 122.02, WLC 122.05, WLC 122.14

1912 Act 8 s 32(b) – WLC 122.02, WLC 122.05

1912 Act 8 s 32(g) – WLC 122.02, WLC 122.05

1912 Act 8 s 45 – WLC 122.18

1912 Act 8 s 46 – WLC 122.10

1912 Act 8 s 51 – WLC 122.10

1912 Act 8 s 61 – WLC 122.10

1912 Act 8 s 62 – WLC 122.04, WLC 122.07

1912 Act 8 s 63 – WLC 122.19

1912 Act 8 s 63-79 – WLC 122.10
1912 GN 982 r 22 (Principles to Guide Water Courts) – WLC 122.16
Attorney-General v Staffordshire County Council 1905 1 Ch 336 – WLC 122.12
Colonial Government v Durban Corporation 1907 N (28 NLR) 212 – WLC 122.12
Cumming v Brown 1909 EDL 54 – WLC 122.12
North London Railway Co v Great Northern Railway Co 1883 11 QBD 30 CA, 52 LJ QB 380 – WLC 122.12
Smit v Motsepe 1926 Uys WLC 110 A – WLC 122.16
Transvaal Property and Investment Company Limited v Ditcher and Pretoria Municipality 1921 TPD 261 – WLC 122.13
HALSBURY 17 505+ – WLC 122.12
VAN DER LINDEN *Judiciele Practijk* 2 19 3 – WLC 122.12

***Pretorius v Pretorius* 1926 Uys WLC 123 T**

[WLC 123 NOTES]

Judgment Date 1926-12-17. **Court** TPD. **Judge(s)** CE BARRY

Also reported as *Pretorius and Another v Pretorius* 1927 TPD 178

Quick-note

Undivided riparian property – one co-owner preventing other using water from dam – spoliation interdict – supreme court has jurisdiction – proof of irreparably injury

Summary

A public stream ran through a farm which belonged to 2 owners in undivided shares, and each farmed on a part of the farm as agreed between them. There were 2 dams in the stream from which both owners diverted water. When one owner prevented the other owner access to the dam on his part of the farm, the dispossessed owner applied for an interdict on the ground of spoliation.

Held that s 34 of Act 8 of 1912 did not remove the supreme court's jurisdiction to hear an application for an interdict: therefore it could also hear an application for a spoliation interdict.

Being a riparian owner, the applicant would be entitled to water from the river. But for the present case she could not prove a right to the water from that dam: neither an agreement nor a servitude nor prescription.

The fact that she and her predecessor had been using the water from the dam, made her the possessor of the right to water from the dam. The respondent's action in denying the use of that water, would therefore have amounted to spoliation, but since she could not prove irreparable injury, the court denied her an interdict.

Sources Noted

1912 Act 8 s 34 – WLC 123.06
Breyten Collieries Ltd v Dennil (1) 1912 Uys WLC 7 T – WLC 123.07
Du Plessis v Van Heerden 1912 Uys WLC 4 C – WLC 123.06
Nino Bonino v De Lange 1906 TS 120 – WLC 123.09, WLC 123.10, WLC 123.12
Setlogelo v Setlogelo 1914 AD 221 – WLC 123.14, WLC 123.16
LEYSER *Meditationes ad Pandectas* 7 p 551 – WLC 123.12
VOET 43 16 2 – WLC 123.12
VOET 43 16 3 – WLC 123.12
VOET 43 17 7 – WLC 123.12

***Bulawayo Municipality v Roberts* 1927 Uys WLC 124 A**

[WLC 124 NOTES]

Judgment Date 1927-04-12. **Court** AD. **Judge(s)** WH SOLOMON (Chief Justice), JW WESSELS, JS CURLEWIS (Judges of Appeal)

Also reported as *Bulawayo Municipality, Appellant v Roberts, Respondent* 1927 AD 411

Quick-note

Special water court (Southern Rhodesia) – apportionment of water is not a “civil case” – decision therefore not appealable – Act 33 of 1924 (SR); Water Ordinance 1913 (SR); 1906 CAPE Act 32 Irrigation; 1912 Act 8 s 39 391; 1909 (BRIT) South Africa Act s 103

Summary

A special water court appointed in terms of Act 33 of 1924 (SR) may determine the quantity of water to be taken by the municipal council of Bulawayo from the Khami river. The Act further provided that the Water Ordinance 1913 shall apply to the special water court; that Ordinance allows an appeal from the water court to the high court in a civil case. The water court made an order fixing the extent of land irrigable at a certain acreage and a riparian owner (the respondent), being dissatisfied with such order, appealed successfully to the high court of Southern Rhodesia.

On appeal to the appellate division of South Africa (the AD) – under section 103 of the 1909 (BRIT) South Africa Act – the appellant (the municipality) objected that the proceedings before both the water court and the high court were not a “civil case” and that consequently no further appeal lay to the AD. The appeal was upheld.

Sources Noted

1906 CAPE Act 32 s 26 (Irrigation) – WLC 124.06

1909 BRITAIN c 9 s 103 (South Africa Act) – WLC 124.14
 1912 Act 8 s 39(1) – WLC 124.03
 1913 ZIMBABWE Ord 13 (Water) – WLC 124.02, WLC 124.06, WLC 124.07
 1920 ZIMBABWE Ord 8 (Water Ordinance 1913 Amendment) – WLC 124.06
 1924 ZIMBABWE Act 33 (Bulawayo Municipality Water and Electric Supply and Loan) – WLC 124.01, WLC 124.09, WLC 124.11, WLC 124.12, WLC 124.13
Ferreira v Sapiero 1913 Uys WLC 15 A – WLC 124.06

Great Fish River Irrigation Board v Southey (1) 1927 Uys WLC 125 WC

[WLC 125 NOTES]

Judgment Dates 1927-04-22 and 1927-06-01. **Court** WC (Cradock and Cape Town). **Judge(s)** HM LOUWRENS.

Also reported as *Great Fish River Irrigation Board v Southey (Grass Ridge)* Hall 166

Quick-Note

Protection of surplus water – public and private water – intermittent streams – normal flow – reasonable requirements – beneficial use – *ultra vires* regulation

Summary

An irrigation board applied to the water court for the “protection” of its dam in the Great Fish river in which it proposes to impound and divert surplus' water for primary and secondary use for its members, and it such works.

The water court held the required preliminary ex parte hearing to investigate the merits of the scheme, whether it was a public stream, what the quantity of available surplus water was, and which riparian owners might be affected by the requested order and should be given the chance to object.

The owners in the catchment area against whom the protection order is requested, are to state what the requirements are of their own present or future works are. If they fail to appear, they may be prohibited from using the surplus water for which the board claims protection.

The court then issued such notices, after dealing with the effect of the applicable legislation.

Sources Noted

1906 CAPE Act 32 (Irrigation) – WLC 125.46, WLC 125.54. – WLC 125.56
 1906 CAPE Act 32 r 99-109 (Irrigation) – WLC 125.219
 1906 CAPE Act 32 r 113-15 (Irrigation) – WLC 125.107, WLC 125.109
 1906 CAPE Act 32 s 6 (Irrigation) – WLC 125.58, WLC 125.84
 1906 CAPE Act 32 s 7 (Irrigation) – WLC 125.63, WLC 125.88, WLC 125.90, WLC 125.101, WLC 125.107, WLC 125.123, WLC 125.143
 1906 CAPE Act 32 s 8 (Irrigation) – WLC 125.63, WLC 125.64, WLC 125.73, WLC 125.122
 1906 CAPE Act 32 s 10 (Irrigation) – WLC 125.139
 1906 CAPE Act 32 s 68 (Irrigation) – WLC 125.58
 1906 CAPE Act 32 s 81 (Irrigation) – WLC 125.59, WLC 125.229
 1908 TRANSVAAL Act 27 (Irrigation) – WLC 125.46, WLC 125.67
 1908 TRANSVAAL Act 27 s 7 (Irrigation) – WLC 125.68
 1908 TRANSVAAL Act 27 s 8 (Irrigation) – WLC 125.68
 1908 TRANSVAAL Act 27 s 46 (Irrigation) – WLC 125.84
 1908 TRANSVAAL Act 27 s 47 (Irrigation) – WLC 125.70
 1908 TRANSVAAL Act 27 s 48 (Irrigation) – WLC 125.70
 1908 TRANSVAAL Act 27 s 49 (Irrigation) – WLC 125.113, WLC 125.122
 1909 CAPE Act 40 (Irrigation Amendment) – WLC 125.46, WLC 125.71
 1909 TRANSVAAL Act 7 (Irrigation Amendment) – WLC 125.46, WLC 125.72
 1912 Act 8 s 2 “normal flow” – WLC 125.78
 1912 Act 8 s 2 “public stream” – WLC 125.76, WLC 125.85
 1912 Act 8 s 2 “surplus water” – WLC 125.79
 1912 Act 8 s 10 – WLC 125.10, WLC 125.85, WLC 125.150, WLC 125.201, WLC 125.203
 1912 Act 8 s 10 (2) – WLC 125.153
 1912 Act 8 s 10(4) – WLC 125.84, WLC 125.184, WLC 125.236
 1912 Act 8 s 11 – WLC 125.84
 1912 Act 8 s 11(2) – WLC 125.163
 1912 Act 8 s 11(5) – WLC 125.102
 1912 Act 8 s 11(6) – WLC 125.84, WLC 125.85, WLC 125.87, WLC 125.103, WLC 125.106, WLC 125.110, WLC 125.152, WLC 125.157, WLC 125.162, WLC 125.163, WLC 125.175, WLC 125.189, WLC 125.234
 1912 Act 8 s 12 – WLC 125.84, WLC 125.103, WLC 125.104
 1912 Act 8 s 13 – WLC 125.203
 1912 Act 8 s 14 – WLC 125.24, WLC 125.81, WLC 125.85, WLC 125.88, WLC 125.89, WLC 125.90, WLC 125.91, WLC 125.92, WLC 125.95, WLC 125.97, WLC 125.100, WLC 125.101, WLC 125.103, WLC 125.104, WLC 125.106, WLC 125.107, WLC 125.110, WLC 125.112, WLC 125.123, WLC 125.124, WLC 125.136, WLC 125.143, WLC 125.152, WLC 125.154, WLC 125.156, WLC 125.157, WLC 125.161, WLC 125.175, WLC 125.176, WLC 125.188, WLC 125.189, WLC 125.201, WLC 125.220, WLC 125.234, WLC 125.236
 1912 Act 8 s 15 – WLC 125.04, WLC 125.85, WLC 125.91, WLC 125.92, WLC 125.103, WLC 125.108, WLC 125.112, WLC 125.123, WLC 125.125, WLC 125.128, WLC 125.154, WLC 125.156, WLC 125.157, WLC 125.161, WLC 125.176, WLC 125.193, WLC 125.194, WLC 125.201, WLC 125.206, WLC 125.220, WLC 125.231
 1912 Act 8 s 15(1) – WLC 125.112
 1912 Act 8 s 15(2) – WLC 125.15, WLC 125.112, WLC 125.113, WLC 125.115, WLC 125.117, WLC 125.121, WLC 125.122, WLC 125.142, WLC 125.206, WLC 125.208, WLC 125.209
 1912 Act 8 s 16 – WLC 125.36, WLC 125.85, WLC 125.91, WLC 125.92, WLC 125.103, WLC 125.123, WLC 125.134, WLC 125.161, WLC 125.193. – WLC 125.194, WLC 125.201, WLC 125.231, WLC 125.240

1912 Act 8 s 16(1) – WLC 125.02, WLC 125.03, WLC 125.05, WLC 125.09, WLC 125.13, WLC 125.20, WLC 125.33, WLC 125.35, WLC 125.41, WLC 125.125, WLC 125.132, WLC 125.144, WLC 125.145, WLC 125.153, WLC 125.162, WLC 125.217
 1912 Act 8 s 16(1)(a) – WLC 125.128, WLC 125.194, WLC 125.195
 1912 Act 8 s 16(1)(b) – WLC 125.14, WLC 125.15, WLC 125.21, WLC 125.40, WLC 125.41, WLC 125.43, WLC 125.130, WLC 125.133, WLC 125.139, WLC 125.143, WLC 125.179, WLC 125.194, WLC 125.195, WLC 125.196, WLC 125.240
 1912 Act 8 s 16(2) – WLC 125.17, WLC 125.137, WLC 125.141, WLC 125.147, WLC 125.148, WLC 125.154, WLC 125.158, WLC 125.185, WLC 125.189, WLC 125.194, WLC 125.206, WLC 125.220
 1912 Act 8 s 16(3) – WLC 125.230, WLC 125.231
 1912 Act 8 s 16(4) – WLC 125.206, WLC 125.213
 1912 Act 8 s 16(5) – WLC 125.138
 1912 Act 8 s 16(6) – WLC 125.02, WLC 125.03, WLC 125.06, WLC 125.14, WLC 125.20, WLC 125.127, WLC 125.129, WLC 125.194
 1912 Act 8 s 17 – WLC 125.92
 1912 Act 8 s 18 – WLC 125.24, WLC 125.82, WLC 125.85, WLC 125.88, WLC 125.89, WLC 125.90, WLC 125.92, WLC 125.95, WLC 125.96, WLC 125.100, WLC 125.101, WLC 125.103, WLC 125.105, WLC 125.106, WLC 125.107, WLC 125.108, WLC 125.110, WLC 125.114, WLC 125.123, WLC 125.128, WLC 125.143, WLC 125.152, WLC 125.154, WLC 125.156, WLC 125.157, – WLC 125.161, WLC 125.175, WLC 125.188, WLC 125.189, WLC 125.201, WLC 125.210, WLC 125.212, WLC 125.234, WLC 125.236
 1912 Act 8 s 19 – WLC 125.108
 1912 Act 8 s 23 – WLC 125.133, WLC 125.139
 1912 Act 8 s 24 – WLC 125.14, WLC 125.21, WLC 125.83, WLC 125.85, WLC 125.122, WLC 125.129, WLC 125.156, WLC 125.157, WLC 125.181, WLC 125.236
 1912 Act 8 s 39(1) – WLC 125.240
 1912 Act 8 s 42 – WLC 125.238
 1912 Act 8 s 45(1) – WLC 125.95, WLC 125.229
 1912 Act 8 s 45(2) – WLC 125.230, WLC 125.233, WLC 125.233
 1912 Act 8 s 101 – WLC 125.15, WLC 125.142, WLC 125.209, WLC 125.218, WLC 125.223
 1912 Act 8 s 102 – WLC 125.15, WLC 125.142, WLC 125.209, WLC 125.218, WLC 125.223
 1912 Act 8 s 138 – WLC 125.84, WLC 125.235
 1912 GN 982 r 1-10 (Principles to Guide Water Courts) – WLC 125.95, WLC 125.219
 1912 GN 982 r 2-5 (Principles to Guide Water Courts) – WLC 125.103, WLC 125.108
 1912 GN 982 r 10-21 (Principles to Guide Water Courts) – WLC 125.219
 1912 GN 982 r 11-20 (Principles to Guide Water Courts) – WLC 125.220
 1912 GN 982 r 12 (Principles to Guide Water Courts) – WLC 125.07, WLC 125.08, WLC 125.128
 1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 125.07, , WLC 125.194
 1912 GN 982 r 11-20 (Principles to Guide Water Courts) – WLC 125.220
 1912 GN 982 r 15-16 (Principles to Guide Water Courts) – WLC 125.220
 1912 GN 982 r 17 (Principles to Guide Water Courts) – WLC 125.221, WLC 125.222, WLC 125.224, WLC 125.225, WLC 125.227
 1912 GN 982 r 19 (Principles to Guide Water Courts) – WLC 125.228
 1912 GN 982 r 22 (Principles to Guide Water Courts) – WLC 125.116
 1912 GN 982 r 65-76 (Principles to Guide Water Courts) – WLC 125.10
Hildick Smith, R v 1924 TPD 69 – WLC 125.233
Institute of Patent Agents v Lockwood 1894 AC 347 – WLC 125.233
Smartt Syndicate Ltd re Ongers River (1) 1917 Uys WLC 56 WC – WLC 125.26, WLC 125.90, WLC 125.132, WLC 125.134, WLC 125.142
Smartt Syndicate Ltd v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 125.238, WLC 125.239
Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 125.26, WLC 125.89, WLC 125.133, WLC 125.151, WLC 125.162, WLC 125.166
Southey v Southey 1905 C (22 SC) 650 – WLC 125.66, WLC 125.183, WLC 125.205
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 125.202
Union Government v Zak River Estates 1918 Uys WLC 58 WC – WLC 125.118, WLC 125.120, WLC 125.209, , WLC 125.211, WLC 125.225, WLC 125.234

Union Government v Bolam 1927 Uys WLC 126 A

[WLC 126 NOTES]

Judgment Date 1927-05-04. **Court AD.** **Judge(s)** WH SOLOMON (Chief Justice), J DE VILLIERS, JW WESSELS, JS CURLEWIS (Judges of Appeal)

Also reported as *Union Government (Minister of Justice) Appellant v Bolam, Respondent 1927 AD 467*

Quick-note

Government irrigation works – land on which constructed – attachment

Summary

Bolam obtained judgment in the magistrate's court of Vanrhynsdorp for £115 against the Oliphants River Irrigation Board. On a return of *nulla bona* to the writ issued on this judgment, the messenger attached land which was registered in the name of the board and on which there were irrigation works.

The government applied to set aside the attachment on the ground that the land belonged to it and was not executable.

The magistrate granted the application, and Bolam appealed to the CPD which reversed the magistrate's order. On appeal by the government to the AD:

HELD: Since the board constructed the irrigation works with money borrowed from the government, the works became “government irrigation works”, and that the ownership in government irrigation works and of the land on which they are constructed, vested in the government, notwithstanding that the land was registered in the name of the board.

The order of the magistrate in setting aside the attachment was therefore correct, and the decision of the CPD was reversed.

Sources Noted

1912 Act 5 (Olifants River {Van Rhynsdorp Canal}) – WLC 126.02, WLC 126.03
1912 Act 8 s 2 “irrigation work” – WLC 126.06
1912 Act 8 s 7 – WLC 126.03
1912 Act 8 s 17 – WLC 126.04, WLC 126.07
1917 Act 28 s 2 (Olifants River Irrigation Works) – WLC 126.02, WLC 126.03

***Lawrie v Holmes* 1927 Uys WLC 127 O**

[WLC 127 NOTES]

Judgment Date 1927-05-19. **Court** OPD. **Case No** 211/1927. **Judge(s)** AJ McGREGOR, HF BLAINE

Also reported as *Lawrie v Holmes and Others* 1927 OPD 199

Quick-note

River board – election of members – commencement of office

Summary

At a meeting of the Kafir River Irrigation Board on 23 March 1927, H and S were elected as members of the board. A notice which declared them elected was published in the *Gazette* on 1 April. At a meeting of the board on March 28 a sitting member (R) and H and S were present but the chairman (L) was absent. At the meeting H was elected chairman for the ensuing year.

L applied to court for an order that the election of H as chairman of the board was invalid and should be set aside because the membership of H and S commenced only 3 days later, namely on the date of publication in the *Gazette*.

The court issued a rule nisi and later confirmed it.

Sources Noted

1912 Act 8 s 56 – WLC 127.04
1912 Act 8 s 57 – WLC 127.03, WLC 127.05
1912 Act 8 s 57(5) – WLC 127.10
1912 Act 8 s 60(2) – WLC 127.15
1912 GN 1692(2) r 10, r 17 (River Boards) – WLC 127.08

***De Wet v Deetlefs (1)* 1927 Uys WLC 128 C**

[WLC 128 NOTES]

Judgment Date 1927-09-13. **Court** CPD. **Judge(s)** LE BENJAMIN, P BUCHANAN

Also reported as *De Wet v Deetlefs* 1927 CPD 328

Quick-note

Aqueduct servitude – infringement of terms – is a “dispute as to water rights” – water court has sole jurisdiction

Summary

A servitude of aqueduct allowed D to conduct water over a W’s farm on condition that the pipes and furrow should not cause inconvenience to W. W claimed damages in the supreme court from D alleging that the furrows drained his subsoil water and impeded the movement of his cattle.

D pleaded that the supreme court had no jurisdiction because the servitude was registered by an order of a water court as part of a division of the water of a public river, and that the matter was a “dispute or claim as to water rights” on which only a water court had jurisdiction.

W excepted to the jurisdiction plea.

Held that the water court had sole jurisdiction to make an order on a water rights dispute, and it therefore also had sole jurisdiction to enforce the terms of its order – in this case the alleged infringement of the servitude.

Sources Noted

1912 Act 8 s 32(a) – WLC 128.06
1912 Act 8 s 34 – WLC 128.08, WLC 128.11
1912 Act 8 s 34(1) – WLC 128.05
1912 Act 8 s 39 – WLC 128.10
1912 Act 8 s 42 – WLC 128.10
1912 Act 8 s 102 – WLC 128.07

***Garlick v Smartt (1)* 1927 Uys WLC 129 A**

[WLC 129 NOTES]

Judgment Date 1927-10-18. **Court** AD. **Judge(s)** WH SOLOMON (Chief Justice), JW WESSELS, JS CURLEWIS, J STRATFORD (Judges of Appeal)

Also reported as *Garlick, Applicant v Smartt and Another, Respondents* 1928 AD 43

Quick-note

Water court – appeal from – leave by Appellate Division

Summary

G applied to the water court under for an order to declare the rights of the parties under regulations which were made more than a century ago by the Cape government, and for an investigation, definition and recording of rights to the use of water of certain streams and an apportionment of water for irrigation and other purposes.

R filed certain objections to the application and G excepted to the objections on the ground that they disclosed no defence.

The water court dismissed the exceptions and its decision was confirmed on appeal to the Cape provincial division, which thereafter granted leave to appeal to the Appellate Division.

On application to the AD for its leave to appeal:

HELD: Although exceptions in the water courts – with their informal procedure – should be discouraged, the questions raised in this case were very important and it was desirable that the Appellate Division should give its decision on them. Leave to appeal granted.

Sources Noted

1912 Act 8 s 39(1) – WLC 129.01

1912 Act 8 s 103 – WLC 129.02

1912 Act 8 s 105 – WLC 129.02

Ball v Erasmus* 1927 Uys WLC 130 WC*[WLC 130 NOTES]**

Judgment Date 1927-10-24. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ball v Erasmus* Hall 221

Quick-Note

Apportionment – gauging – river board to effect distribution

Summary

Application for investigation, definition and recording of rights to the use of the water of a public stream.

The applicant must supply the court with data regarding the irrigable areas of all parties in default. The court will not apportion the water of a public stream in cases where it has insufficient data for effecting a fair and satisfactory division, even when all the parties in the suit consent.

The distribution of a stream can be made either by defined quantity, share of flow or turn of flow. If the flow varies it is effected by allotting percentages or turns. If a distribution by quantity is required, systematic gauging is necessary of all water diverted from the river. Although a water court has no direct authority to order gauging devices or to let another do the distribution, it has assumed ancillary jurisdiction to do these things in order to effect an equitable distribution. Where it is impossible to effect an equitable distribution without continuous gauging and control and where the riparian owners fail to form a river board, the court will refuse to grant an order for distribution.

Sources Noted

1912 Act 8 s 26(2) – WLC 130.31

1912 Act 8 s 42(2)(a) – WLC 130.48

1912 Act 8 s 61(1)(g) – WLC 130.49

1912 Act 8 s 62 – WLC 130.40

1912 Act 8 s 75 – WLC 130.51

1912 Act 8 s 89(1)(a) – WLC 130.51

1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 130.08, WLC 130.09, WLC 130.10

1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 130.11, WLC 130.12, WLC 130.18, WLC 130.19

1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 130.11

1913 Proc 69 (Hennops River Dolomite Area) – WLC 130.04

1914 Act 32 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 130.63

Germiston Municipality v Angehrn and Piel 1913 TPD 125 – WLC 130.38

Louvis v Municipality of Roodepoort-Maraisburg 1916 AD 268 – WLC 130.38

Middelburg Municipality v Gertzen 1914 AD 544 – WLC 130.38

Reid v Van der Merwe 1926 Uys WLC 122 T – WLC 130.55

Union Government re Mooi River (2) 1915 Uys WLC 32 WC – WLC 130.35, WLC 130.42, WLC 130.43, WLC 130.52, WLC 130.55

BROOM *Legal Maxims* ed 8 p 372 (implied jurisdiction) – WLC 130.38

Garlick v Smartt (2)* 1927 Uys WLC 131 A*[WLC 131 NOTES]**

Judgment Date 1927-11-12. **Court** AD. **Judge(s)** WH SOLOMON (Chief Justice), JW WESSELS, JS CURLEWIS, J STRATFORD (Judges of Appeal)

Also reported as *Garlick, Appellant v Smartt & Another, Respondents* 1928 AD 82

Quick-note

Water court – informal procedure – exceptions – confusing regulations on riparian rights – meaning to be ascertained by evidence

Summary

A riparian owner alleged that upper owners deprived him of his water rights to which he was entitled under regulations of 1819. He applied to a water court for an order declaring the rights of the parties under the regulations and an investigation to define those rights and for an apportionment of the water for irrigation and other purposes between himself and the other riparian owners.

The other owners (respondents) denied that the applicant had any right to the water of either of the two streams under the regulations; or alternatively that the applicant had by prescription lost any right to the water.

Applicant excepted to the objections on the ground that they disclosed no defence. The water court dismissed the exceptions, and so did the Cape provincial division to which the applicant appealed.

On a further appeal, the AD also dismissed the exceptions and confirmed the decision of the CPD, holding – that the regulations were so obscure, confusing and conflicting that evidence including a personal inspection of the locality itself, would be admissible to explain their true meaning;

that exceptions should not have been taken, because the court would have decided the matters on evidence to be led, and also because the proceedings in water courts are intended to be less formal than proceedings in Superior court s; and

that appellant's rights remained open and would not be prejudiced by having his exceptions dismissed.

[On the appellant's application for leave to bring this appeal to the AD, see *Garlick v Smartt (1)* 1927 Uys WLC 129 A above]

Sources Noted

1819 CAPE Council of Justice Resolution 1819-06-14 r 4, r 5, r 11 (Water Regulations) – WLC 131.01, WLC 131.09, WLC 131.11

1912 Act 8 s 32(a) – WLC 131.01

1912 Act 8 s 32(b) – WLC 131.01

De Wet v Cloete 1828-49 C (1 M) 405 – WLC 131.17, WLC 131.18

Richter v Bloemfontein Town Council (2) 1922 Uys WLC 87 A – WLC 131.14

Great Fish River Irrigation Board v Southey (2)* 1927 Uys WLC 132 A*[WLC 132 NOTES]**

Judgment Date 1927-11-14. **Court AD.** **Judge(s)** WH SOLOMON (Chief Justice), JW WESSELS, JS CURLEWIS, J STRATFORD (Judges of Appeal)

Also reported as *Great Fish River Irrigation Board, Appellant v Southey, Respondent* 1928 AD 113

Quick-note

Water court – appeal – against ruling at preliminary investigation on service of notices

Summary

An irrigation board (the appellant) applied to the water court under s 15 of Act 8 of 1912 for permission to store water in its dam in the river and for a determination of the amount of surplus water which it might divert or store for primary and secondary purposes.

An investigation was held in terms of s 16(1) to decide whether to grant the application and which riparian owners might be affected by such grant. The court decided to grant the application on condition (1) that all upstream and downstream owners who had constructed works or who intended to construct works, were to be notified and (2) that those owners who replied to the notices, had to share the surplus water with the board.

The board appealed against (1), contending that only upstream owners were to be notified. Southey appealed against (2), contending that upstream owners were entitled to all the surplus water which they reasonably require for primary and secondary use.

The AD held that it had no jurisdiction to hear any of the two appeals, because neither were final orders which were appealable: the investigation under s 16(1) was preliminary only, and the findings could be amended by the water court after the final investigation under s 16(2) was held.

Sources Noted

1912 Act 8 s 15 – WLC 132.02, WLC 132.54

1912 Act 8 s 16 – WLC 132.48, WLC 132.55, WLC 132.75

1912 Act 8 s 16(1) – WLC 132.03, WLC 132.05, WLC 132.06, WLC 132.07, WLC 132.08, WLC 132.12, WLC 132.19, WLC 132.22, WLC 132.23, WLC 132.25, WLC 132.26, WLC 132.30, WLC 132.45, WLC 132.46, WLC 132.47, WLC 132.53, WLC 132.54, WLC 132.59, WLC 132.61, WLC 132.64, WLC 132.65, WLC 132.70, WLC 132.72, WLC 132.73, WLC 132.74, WLC 132.77

1912 Act 8 s 16(1)(b) – WLC 132.33, WLC 132.35, WLC 132.55, WLC 132.56, WLC 132.57, WLC 132.71

1912 Act 8 s 16(1)(h) – WLC 132.33, WLC 132.56

1912 Act 8 s 16(2) – WLC 132.12, WLC 132.19, WLC 132.20, WLC 132.30, WLC 132.49, WLC 132.60, WLC 132.61, WLC 132.65, WLC 132.72

1912 Act 8 s 37 – WLC 132.17, WLC 132.41, WLC 132.53, WLC 132.64

1912 Act 8 s 37(1) – WLC 132.21, WLC 132.66

1912 Act 8 s 37(2) – WLC 132.22, WLC 132.66, WLC 132.76

1912 Act 8 s 38 – WLC 132.67, WLC 132.78

1912 Act 8 s 39(1) – WLC 132.11, WLC 132.17, WLC 132.20, WLC 132.23, WLC 132.25, WLC 132.30, WLC 132.36, WLC 132.39, WLC 132.45, WLC 132.53, WLC 132.63, WLC 132.64, WLC 132.65, WLC 132.70, WLC 132.74
1912 Act 8 s 40 – WLC 132.43, WLC 132.68
1912 Act 8 s 41 – WLC 132.23, WLC 132.44, WLC 132.69
1912 Act 8 s 42 – WLC 132.24, WLC 132.52, WLC 132.73
1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 132.62
1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 132.13, WLC 132.62, WLC 132.75
Smartt Syndicate Ltd v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 132.34

***Potgieter v Bauscher* 1927 Uys WLC 133 WC**

[WLC 133 NOTES]

Judgment Date 1927-12-08. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Potgieter v Bauscher* Hall 234

Quick-Note

Stream disappearing and re-appearing – remains a public stream

Summary

Application for the investigation, definition and recording of rights to the water of a public stream.

The defined channel of a stream disappeared at a certain spot. When it re-appeared lower down, it was 200 yards wide, quite flat and covered with grass, after which it joined another stream.

Held, that this interruption of the course did not alter the character of the stream, and that it was a public stream.

Sources Noted

1912 Act 8 s 3 – WLC 133.07

Hiscock v De Wet 1880-4 A (1 BAC) 58 – WLC 133.07

DE VILLIERS *JER Water Law 7: Tributaries*, in SALJ 1921 38 389 – WLC 133.13

***De Wet v Deetlefs (2)* 1928 Uys WLC 134 A**

[WLC 134 NOTES]

Judgment Date 1928-03-07. **Court** AD. **Judge(s)** WH SOLOMON (Chief Justice), J de VILLIERS, JW WESSELS, JS CURLEWIS, J STRATFORD (Judges of Appeal)

Also reported as *De Wet, Appellant v Deetlefs, Respondent* 1928 AD 286

Quick-note

Jurisdiction of water court – enforcement of servitude – is not a “dispute or claim as to water rights” – supreme court has concurrent jurisdiction

Summary

A servitude of aqueduct over W’s farm entitled D to lead water over the farm by pipes and a furrow. The water was public water, divided among riparian owners by the water court in 1915; the servitude was a part of such division in the order of the water court.

Some years later D relaid the pipes and furrow but W alleged that the work was done negligently. W claimed damages in the supreme court and D pleaded that the court had no jurisdiction because it was a “dispute or claim as to water rights” over which a water court had sole jurisdiction. W excepted to the plea but the court overruled the exception and held that the court had no jurisdiction.

On appeal by D, the AD reversed the decision of the provincial division because the issue was not a “dispute or claim as to water rights” but simply whether D had exercised his admitted rights negligently or not: therefore the water court did not have exclusive jurisdiction.

Sources Noted

1912 Act 8 s 34 – WLC 134.01, WLC 134.02, WLC 134.07, WLC 134.08, WLC 134.09, WLC 134.15, WLC 134.18

1912 Act 8 s 9 – WLC 134.08

1912 Act 8 s 27(2) – WLC 134.14

1912 Act 8 s 32 – WLC 134.14, WLC 134.15

***Still, R v* 1928 Uys WLC 135 T**

[WLC 135 NOTES]

Judgment Date 1928-03-16. **Court** TPD. **Judge(s)** D de WAAL (Judge President), S SOLOMON

Also reported as *Rex v Still* 1928 TPD 367

Quick-note

Taking more water from public stream than entitled to under servitude — whether criminal offence

Summary

All the water rights of a riparian farm (W) were granted to a lower riparian farm (V) and this was embodied in a servitude registered before Act 8 of 1912 was passed.

Mr Still, the lessee of farm W, knew of the servitude but nevertheless took water from the stream whereupon the owner of farm V laid a complaint against Still of contravening s 133(1)(b) the Act. The court found the accused guilty, holding that a complainant was not confined to a civil remedy.

Sources Noted

1912 Act 8 s 8 – WLC 135.12

1912 Act 8 s 9 – WLC 135.12

1912 Act 8 s 10(4) WLC 135.12

1912 Act 8 s 12 – WLC 135.12

1912 Act 8 s 14 – WLC 135.12

1912 Act 8 s 20 – WLC 135.12

1912 Act 8 s 133(1)(b) – WLC 135.01, WLC 135.07, WLC 135.11, WLC 135.14, WLC 135.16, WLC 135.18

1912 Act 8 s 133(1)(a) – WLC 135.10

Still v Rex 1923 T (UR) – WLC 135.16

Touyz, R v 1916 Uys WLC 41 C – WLC 135.17

***Calitz v Lyle* 1928 Uys WLC 136 C**

[WLC 136 NOTES]

Judgment Date 1928-09-05. **Court** CPD. **Judge(s)** FG GARDINER (Judge President), EF WATERMEYER

Also reported as *Calitz v Lyle* 1928 CPD 544

Quick-note

Jurisdiction – Failure to object timeously – Dispute as to water rights

Summary

C alleged in his summons in the magistrates' court that L had obstructed his use of a furrow and had thereby deprived him of a turn of water causing him £50 damages. After L's appearance and plea and C's replication, L filed an objection that the court had no jurisdiction on the ground that the dispute was one as to water rights. No consent in terms of s 34 of Act 8 of 1912 was lodged by the defendant that the action may be heard by a court other than a water court.

The question was whether it was a "dispute as to water rights". The following points were in dispute: (a) The time when it was C's turn for water from the furrow; (b) How long C's turn was; (c) Whether there was sufficient water; (d) C's damage

The magistrate held that the dispute was a "dispute as to water rights" and upheld L's objection to the jurisdiction.

On an appeal against this decision: Held that the magistrate had rightly decided that (a) and (b) above constituted a dispute as to water rights and that only the water court therefore had jurisdiction to hear the dispute.

Sources Noted

1912 Act 8 s 33 – WLC 136.04

1912 Act 8 s 34 – WLC 136.05, WLC 136.06, WLC 136.07, WLC 136.08

1917 Act 32 (Magistrates' Courts) – WLC 136.07

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 136.08

***Natal Estates Ltd re Umgeni River* 1928 Uys WLC 137 WC**

[WLC 137 NOTES]

Judgment Date 1928-10-09. **Court** WC (Durban). **Judge(s)** C JEPPE.

Also reported as *Ex parte Natal Estates Ltd* Watermeyer 1.1

Quick-Note

Notice to multitude of respondents – substituted service

Summary

In an application for the apportionment of a river's water, the respondents numbered over 1500, including some 1000 Indians. In many instances neither their present nor their last-known places of abode were ascertainable, nor was it known whether they resided within the Union or outside it.

The court directed –

(a) that there should be personal service on respondents where possible;

(b) that where such was not possible there should be service at the last-known place of abode;

(c) that, where no such place of abode could be ascertained, a notice should be published in the *Gazette* and the notice should be posted up at all places in the area concerned where Indians were likely to congregate, such as shops, mosques, schools, sporting grounds and at the offices of the Magistrate and of the Police in the district and of the Protector of Indians.

Sources Noted

1912 Act 8 s 20 – WLC 137.02
1912 Act 8 s 21 – WLC 137.02
1912 Act 8 s 23 – WLC 137.02
1912 Act 8 s 131 – WLC 137.06, WLC 137.07
1917 GN 459 r 45 (Water Court Rules) – WLC 137.04, WLC 137.07
1917 GN 459 r 46 (Water Court Rules) – WLC 137.08

Rivas v Premier Transvaal Diamond Mining Co Ltd 1928 Uys WLC 138 W

[WLC 138 NOTES]

Judgment Date 1928-10-22. **Court** WLD. **Judge(s)** CE BARRY

Also reported as *Rivas v The Premier (Transvaal) Diamond Mining Co Ltd 1929 WLD 1*

Quick-note

Water pollution – Damages in lieu of interdict

Summary

R's farm was on a stream arising on P's property. R alleged that as a result of P's mining operations the stream had become choked with slimes and tailings and the water so muddy and unclean as to be unfit for human or animal consumption or irrigation. He claimed £1000 damages for past injury and an interdict or alternatively a further £2000 damages.

P admitted that the water at times became discoloured by the admixture of a certain amount of innocuous sand but denied that any damage had been or would be caused to the plaintiff thereby and tendered £50 for any discomfort caused by the discolouration.

The court found that P's mining polluted the stream by slimes, which made it unsuitable for drinking but that drinking water could be obtained cheaply by percolation holes; that the slimes did not harm crops but silted up irrigation works; that the plaintiff did not yet have such works but merely intended to construct them.

Held that P should be given time to prevent the polluting of the stream and R was therefore given leave to apply for an interdict after two years if P failed to stop the pollution.

Sources Noted

1912 Act 8 s 11(5) – WLC 138.26
Graham v Dittmann & Son 1917 TPD 288 – WLC 138.25
Holland v Scott 1881-2 E (2 EDC) 307 – WLC 138.25
John Young & Co v Bankier Distillery Co 1893 AC 691 – WLC 138.26

New Consort Gold Mines Ltd v Kritzinger (I) 1928 Uys WLC 139 T

[WLC 139 NOTES]

Judgment Date 1928-11-16. **Court** TPD. **Judge(s)** R FEETHAM

Also reported as *New Consort Gold Mines Ltd v Kritzinger and Another* 1929 TPD 21

Quick-note

Riparian property – title deed restricting use of water – term not in title of lower riparian properties – not a servitude in favour of lower owners — nor a benefit in favour of third parties – lower owner has no right to interdict.

Summary

When a riparian owner (K) started withdrawing water from the public stream for irrigation, it seriously affected a lower owner (N) who needed large quantities of water for its mining activities and who had State-granted water rights on the stream for that purpose.

N applied to court for an interdict against K on the basis that there was a term in K's title deed (a State grant) which allowed him to withdraw water only for primary purposes (domestic and stock watering) except if he first obtained the written permission of the Minister of Mines to use it for other purposes.

N argued that the term was in effect a servitude in favour of lower owners, even though the term was not registered in the title deeds of any lower owners. Alternatively, that it was a term inserted by the State in favour of third parties (ie the lower owners).

Held, on the interpretation of the grant, that the term did not confer upon the lower owners any rights as against the upper owner: the term was inserted in favour of the State itself.

Sources Noted

1908 Act 35 s 60 – WLC 139.02
Baikie v Pretoria Municipality 1921 TPD 376 – WLC 139.25
Meintjes v Oberholzer & Graafreinet Municipality 1857-60 C (3 S) 265 – WLC 139.15
Vermeulen's Executrix v Moolman 1911 AD 384 – WLC 139.13, WLC 139.15, WLC 139.32

***Labuschagne v Steyn* 1928 Uys WLC 140 O**

[WLC 140 NOTES]

Judgment Date 1928-12-04. **Court** OPD. **Case** 478/1928. **Judge(s)** CL BOTHA, CWH LANSDOWN

Also reported as *Labuschagne v Steyn* 1929 OPD 20

Quick-note

Flood water – causing erosion of lower land – whether works on upper land increased or concentrated water – whether normal or artificial channel

Summary

Flood water from upper farm A caused erosion on lower farm B. B alleged that the natural channel of the water was directly from A to farm C, but that the owner of A constructed works on the channel, which caused most of the flood water to be diverted to B. B claimed damages from and an interdict against A.

B pleaded that the channel from A to C was not the natural channel but a man-made furrow and that the natural channel was from A to B. After an inspection in loco the court held that B had not proved that the A to C furrow was the natural channel, or that the works by A had diverted the floodwater from its natural course.

Sources Noted

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 140.07

Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 – WLC 140.07

VOET 39 3 2 – WLC 140.07

VOET 39 3 4 – WLC 140.07

***Great Fish River Irrigation Board v Southey (3)* 1928 Uys WLC 141 WC**

[WLC 141 NOTES]

Judgment Date 1928-12-24. **Court** WC (Cape Town). **Judge(s)** HM LOUWRENS

Also reported as *Great Fish River Irrigation Board v Southey (Rooispruit)* Hall 237

Quick-Note

Protection for surplus water – public stream – defined channel – tributary – Works within the same catchment

Summary

In an application for protection, objection was made that the stream was not a public stream.

Held: A stream which falls within the statutory definition of a public stream for a part of its course, is a public stream in regard to that part only. If it has a defined channel for a considerable part of its course but, from a certain point, the water spreads over an extensive level area, where which no defined channel is visible, it is not a public stream below the point where the defined channel ceases.

If the spread out water eventually finds its way by a natural process of gravitation into a public stream, the owners riparian to the public stream cannot require the owners riparian to the non-public stream to declare their works.

An applicant can obtain a protection order only against owners of properties riparian to the same stream as applicant's own property. An applicant must also himself be entitled to use the water of that stream.

Sources Noted

1912 Act 8 s 2 “public stream” – WLC 141.05

1912 Act 8 s 14 – WLC 141.23, WLC 141.24

1912 Act 8 s 15 – WLC 141.24, WLC 141.25, WLC 141.26, WLC 141.27

1912 Act 8 s 16 – WLC 141.20, WLC 141.26, WLC 141.27

1912 Act 8 s 16(1) – WLC 141.01, WLC 141.20, WLC 141.21

1912 Act 8 s 16(1)(b) – WLC 141.02, WLC 141.03, WLC 141.19, WLC 141.20

1912 Act 8 s 16(2) – WLC 141.20

1917 GN 459 r 21 (Principles to Guide Water Courts) – WLC 141.31

1917 GN 459 r 23 (Principles to Guide Water Courts) – WLC 141.31

1917 GN 459 r 24 (Principles to Guide Water Courts) – WLC 141.31

Ohlsson's Cape Breweries v Artesian Well-Boring Co Ltd 1919 Uys WLC 66 O – WLC 141.13

ANGELL *Law of Water Courses* par 4 – WLC 141.09

COULSON AND FORBES *Law of Waters* ed 2 58-9 – WLC 141.10

FARNHAM 2 1554-8 – WLC 141.11

HALSBURY *Laws of England* 28 838 – WLC 141.08

***Barberton Municipality v CT Andrews & Son Ltd* 1929 Uys WLC 142 WC**

[WLC 142 NOTES]

Judgment Date 1929-01-18. **Court** WC (Barberton). **Judge(s)** C JEPPE.

Also reported as *Barberton Municipality v CT Andrews & Son Ltd and Others* Hall 243

Quick-Note

River flowing into other country and back – rights of lower riparian owners

Summary

Application under for permission to use the water of a public stream on non-riparian land.

A public stream has its source in SA, enters the territory of the neighbouring state of Swaziland and then flows back into the Union in its lower reaches.

Held: In apportioning the use of the water of that part of the stream which lies between its source and the point where it enters Swaziland, the court is need not consider the rights of riparian owners in Swaziland or in the Union below the point of emergence from Swaziland.

Sources Noted

1912 Act 8 s 23 – WLC 142.01

Reinsdorf re Mozane Spruit 1914 Uys WLC 25 WC – WLC 142.03

***Breed re Witpoort Spruit* 1929 Uys WLC 143 WC**

[WLC 143 NOTES]

Judgment Date 1929-07-10. **Court** WC (Witpoort). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Breed* Watermeyer 1.3

Quick-Note

Public stream – proof at hearing – apportionment of part of river

Summary

Application for an apportionment order.

Held: Applicant should allege and prove that it is a public stream It is unnecessary to make a special application to the water court to have the stream declared a public stream before applying for an apportionment of the water in that stream.

Held: The apportionment of the water of a public stream can be confined to a part of the stream. Unless the difficulties of making such an apportionment makes it desirable to wait until a general apportionment of the whole stream is called for.

Held: A water may decide a question of ownership of land only if it involves the right to irrigate such land.

Sources Noted

Grobler v Retief 1918 Uys WLC 59 WC – WLC 143.08

***Eloff re Diversion* 1929 Uys WLC 144 WC**

[WLC 144 NOTES]

Judgment Date 1929-08-03. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Eloff* Watermeyer 1.7

Quick-Note

Apportionment – provisional distribution with insufficient data

Summary

Application for apportionment.

After apportioning the water of a public stream on a percentage basis, the court found that insufficient information with regard to gaugings had been placed before it to enable it to arrange a plan of distribution of the water.

Held: Rather than declare itself unable to distribute the water, the court made a tentative distribution. It has no power to vest a river board with authority to arrange a scheme of distribution,

Held: Leave was reserved to any of the parties to apply for a revision of the distribution if it was found that it gave him less water than was awarded him in the apportionment on the percentage basis.

Sources Noted

1934 Act 46 s 6 (Irrigation Amendment) – WLC 144.03

Reid v Van der Merwe 1927 Uys WLC 122 T – WLC 144.03, WLC 144.08

***Truter v Raubenheimer* 1929 Uys WLC 145 C**

[WLC 145 NOTES]

Judgment Date 1929-08-27. **Court** CPD. **Judge(s)** EF WATERMEYER, PST JONES

Also reported as *Truter v Raubenheimer* 1929 CPD 510

Quick-note

Dispute as to water rights – jurisdiction of magistrates' court – no objection before judgment – requirement of consent in writing.

Rain water in dry furrow from public stream – not public water – accrues to property on which it fell.

Summary

A furrow over farm R conveyed water from a public stream to farm T. At a time when the furrow was dry, heavy rain fell on farm R and flowed into the furrow. Both T and R claimed the rain water in the furrow: T claimed it on the ground that he was entitled to all water in the furrow by servitude agreements; and R claimed it on the ground that he was entitled to all the rain water which fell on his property (in terms of s 8 of Act 8 of 1912).

When R started using the water, T entered farm R and diverted the water to farm T. R claimed damages in the magistrate's court, and T counterclaimed for the water used by R. The magistrate held in R's favour..

T appealed, and also applied for a review of the proceedings on the ground that the magistrate did not have jurisdiction because it was a "dispute as to water rights" over which only a water court had jurisdiction (in terms of s 34) unless the parties consented in writing – which they didn't.

Held as to the jurisdiction: that s 34 was intended for the benefit of both parties to a dispute; that defendant waived the right to object to the jurisdiction because he not only failed to do so during the proceedings in the magistrate's court but he even filed a counterclaim and appealed against the judgment.

Held as to the merits: plaintiff could prove that the water in the furrow was purely rain water, and that he was therefore entitled to all of it ito s 8.

Sources Noted

1912 Act 8 s 2 "public stream" – WLC 145.12

1912 Act 8 s 8 – WLC 145.11

1912 Act 8 s 34 – WLC 145.06

1912 Act 8 s 103(1) – WLC 145.17

Calitz v Lyle 1928 Uys WLC 136 C – WLC 145.07

***West Rand Main Reef v Brink* 1929 Uys WLC 146 T**

[WLC 146 NOTES]

Judgment Date 1929-09-18. **Court** TPD. **Judge(s)** L GREENBERG, CE BARRY

Also reported as *West Rand Main Reef v Brink, Nolte & Others* 1929 TPD 821

Quick-note

Upper riparian owner – restriction on common law rights – "servitude" in title deed vague – interpretation in favour of use of water for primary purposes.

Summary

W, a riparian owner on the Witpoortje stream, Krugersdorp, applied to the water court for a declaration of his rights to the water of the stream. Because a clause in his title deed apparently prohibited him from using the water, and obliged him to let all the water flow down to the lower riparian property of B. But this was contradicted by a clause in the lower property's title deed that the upper property had to use the water of the stream in such a manner that it did not cause damage or harm to the lower property.

The lower owner opposed the application on the ground that a servitude had been constituted, reserving all the water which flowed over the upper property for the lower property. The water court (with the president dissenting) accepted the lower owner's argument.

On appeal, the supreme court held –

That the respondents had to prove their rights and not merely a possibility or a probability that the provisions conferred some benefit on them;

That the provisions in the deeds were too vague to constitute a servitude which could be enforced, and

That applicant was entitled to the order claimed, namely the common law rights of an upper riparian owner.

Sources Noted

1912 Act 8 s 133(1)(b) – WLC 146.03

Still, R v 1928 Uys WLC 135 T – WLC 146.03, WLC 146.05

Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 146.21

MAASDORP Institutes of Cape Law ed 4 vol 2 p 126-7 – WLC 146.08

***New Consort Gold Mines Ltd v Kritzinger (2)* 1929 Uys WLC 147 T**

[WLC 147 NOTES]

Judgment Date 1929-09-23. **Court** TPD. **Judge(s)** BA TINDALL (Acting judge President), CE BARRY

Also reported as *New Consort Gold Mines Ltd v Kritzinger and Another* 1930 TPD 251

Quick-note

Crown grant of riparian land – condition that water to be used for primary purposes only – owner using water for irrigation – affecting lower riparian owner's water rights granted by Crown – lower owner may not act directly against upper owner – even if government fails to intervene

Summary

The Crown, under the Gold Law, granted water rights to the plaintiff mine in the proclaimed Barberton gold mining area. The rights entitled the mine to divert and use water from the Noordkaap and Suidkaap rivers for the purposes of its mine.

The Crown later also granted riparian land, upstream from the mine, to the defendants. The grant contained the restriction that the grantee may use from the public streams on the land “only such water as he may reasonably require for domestic purposes and for watering his own stock running on the land;” if he needed water for any other purposes, he had to get the written permission of the Minister of Mines.

But the defendants, without permission from the Minister, diverted and used water from the stream for irrigation, thereby depleting the water needed by the mine. The mine claimed a restraining order against the defendants.

Held: The defendants as riparian owners had the common law right to use the water for irrigation; such right was restricted by the Crown grant; the defendants could be restrained by the Government but not by the plaintiff; a water right granted under the Gold Laws was not preferent to the rights of upper riparian owners outside the proclaimed area; the grant of land to the defendants was not subject to the water rights previously granted to the mine; the Government did not impose restrictions on water use for the benefit of water rights holders under the Gold Law; such holders could therefore not base a cause of action on such restrictions imposed by the government on others.

Sources Noted

1889 TRANSVAAL Law 8 (Precious and Base Metals Act) [‘1889 Gold Law’] – WLC 147.17
1891 TRANSVAAL Law 10 (Precious and Base Metals Act) [‘1891 Gold Law’] – WLC 147.17
1894 TRANSVAAL Law 11 (Irrigation) – WLC 147.18
1898 TRANSVAAL Law 15 (Precious and Base Metals Act) [‘1898 Gold Law’] – WLC 147.17
1902 TRANSVAAL Ord 45 (Settlers) – WLC 147.19
1903 TRANSVAAL Ord 57 (Crown Lands Disposal) – WLC 147.02, WLC 147.04
1908 TRANSVAAL Act 27 (Irrigation) – WLC 147.18
1908 TRANSVAAL Act 35 s 56-61 (Precious and Base Metals Act) [‘1908 Gold Law’] – WLC 147.09, WLC 147.17, WLC 147.33
1912 Act 8 s 2 “*riparian land*” – WLC 147.13
1912 Act 8 s 137 – WLC 147.10
Alexander v Johns 1912 AD 431 – WLC 147.32
Elliston v Reacher 1908 2 Ch 389 – WLC 147.32
New Consort Gold Mines Ltd v Kritzingers (I) 1929 Uys WLC 139 T – WLC 147.30
Vermeulen's Executrix v Moolman 1911 AD 384 – WLC 147.15

Joubert, R v 1929 Uys WLC 148 T

[WLC 148 NOTES]

Judgment Date 1929-09-26. **Court** TPD. **Judge(s)** BA TINDALL (Acting judge President), S SOLOMON

Also reported as *Rex v Joubert* 1929 TPD 833

Quick-note

Water court order – regulating water turns from public furrow – contravention – proof of order – copy put in by accused – sufficient admission of order

Summary

J was charged with contravening s 133(1)(b) of Act 8 of 1912 by wrongfully interfering with the distribution of water in a public furrow as prescribed by a Water court.

The order of the water court was not put in as evidence by the Crown. But J’s attorney put in an uncertified copy of the order with the object of arguing that the order was only provisional. Accused was convicted. He appealed on the ground that the order of the Water court had not been proved at the trial.

Held: When accused’s attorney put in the order of court he in fact admitted the judgment of the Water court, and under s 318 of Act 31 of 1917 such admission was sufficient proof of the order.

[It was not decided what the effect would be if the order of the water court was indeed only provisional – Ed]

Sources Noted

1912 Act 8 s 133 – WLC 148.09
1912 Act 8 s 133(1)(b) – WLC 148.01
1917 Act 31 s 127(2)(a) (Criminal Procedure) – WLC 148.09
1917 Act 31 s 318 (Criminal Procedure) – WLC 148.11

Middelburg Irrigation Board v Julius Koenig's Estate 1930 Uys WLC 149 T

[WLC 149 NOTES]

Judgment Date 1930-05-16. **Court** TPD. **Judge(s)** L GREENBERG, CE BARRY.

Also reported as *Middelburg Irrigation Board v Julius Koenig's Estate* 1930 2 PH K84 T [NOTE: The report in Prentice-Hall is a mere summary and not a verbatim report of the judgment; it also does not state who delivered the judgment. The full judgment could not be found]

Quick-note

Irrigation board rates – used for irrigation scheme – liability to pay – even if ratepayer's land had not benefited

Summary

The M irrigation board sued K, an owner and ratepayer in its irrigation district, for rates due. K pleaded –

(1) The board raised the rates to pay for the construction of a certain irrigation work; but the Act did not empower a board to raise funds for works by levying rates; Chapter 8 allowed it to raise funds only by means of government or outside loans; a levy for such purposes was therefore invalid.

(2) K and certain other owners derived no benefit from the scheme.

The exceptions to both pleas were upheld for the (summarised) reasons below and the pleas were set aside with costs.

The defendant was granted leave to file an amended plea.

Sources Noted

1912 Act 8 s 89 – WLC 149.01

1912 Act 8 s 89(1) – WLC 149.01, WLC 149.02

1912 Act 8 s 91(1) – WLC 149.01

***Hereford Irrigation Board v Pretorius* 1929 Uys WLC 150 WC**

[WLC 150 NOTES]

Judgment Date 1929-11-12. **Court** WC (Pretoria). **Judge(s)** GJ MARITZ (Acting Water Court Judge).

Also reported as *Hereford Irrigation Board v Pretorius* Watermeyer 1.9

Quick-Note

Servitude of abutment — duty to replace but not to maintain submerged drift

Summary

H was about to raise the sill of his weir across a river, the effect of which would be to submerge a drift belonging to P above the weir. H applied for a servitude of abutment over P's property.

Held: Although H must construct a new drift to replace the old one, he did not have the duty of maintaining it.

Sources Noted

1912 Act 8 s 108 – WLC 150.07, WLC 150.08, WLC 150.09

1912 Act 8 s 105(3) – WLC 150.08

1912 Act 8 s 109 – WLC 150.12

***Bhika v Poliah* 1930 Uys WLC 151 N**

[WLC 151 NOTES]

Judgment Date 1930-08-14. **Court** NPD. **Judge(s)** FS TATHAM, I GRINDLEY-FERRIS

Also reported as *Bhika v Poliah* 1930 NPD 190

Quick-note

Rain water – discharged for years in lower property's drain – lower owner closing drain without notice – overflowing water damaging his crops – damage was his own fault.

Summary

P constructed works having the effect of collecting rain water on his land and discharging it into a drain near the boundary between his land and B's land. After some years B closed the drain without notice to or knowledge of P.

The water collecting on P's land then flowed over B's land and caused damage to B's crops. B unsuccessfully sued P in the Durban magistrates' court to recover this damage.

Held, that as the damage to B's crops was the direct result of his own act in closing the drain, he could not recover.

Sources Noted

[No sources were noted in the judgments]

***Smartt Syndicate Ltd re Ongers River (2)* 1930 Uys WLC 152 WC**

[WLC 152 NOTES]

Judgment Date 1930-10-01. **Court** WC (Victoria West). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte The Smartt Syndicate Ltd* Watermeyer 1.14

Quick-Note

Protection and barring orders – registration in deeds office

Summary

Protection and barring orders were granted but the registrar of deeds refused to register them against the title deeds of the parties affected unless all the deeds were produced simultaneously. This was found to be impracticable and on application to the water court the court granted an order –

(a) directing the owners affected to forward their title deeds to the registrar of the water court and

(b) authorising the registrar of deeds to register the orders against such deeds as should be produced to him from time to time and: to refuse registration of any transaction in connection with any one or more of the title deeds of the remainder of the properties. until the said orders had been so registered against them.

Sources Noted

1912 Act 8 Chapter 2 – WLC 152.19
1912 Act 8 s 15 – WLC 152.02
1912 Act 8 s 16 – WLC 152.02
1912 Act 8 s 24 – WLC 152.19
1912 Act 8 s 24(a) – WLC 152.16
1912 Act 8 s 24(b) – WLC 152.16
1912 Act 8 s 41 – WLC 152.33
1912 Act 8 s 131 – WLC 152.36
Breyten Collieries Ltd v Denny 1913 Uys WLC 11 T – WLC 152.21
Smartt Syndicate Ltd v Richmond Municipality (2) 1921 Uys WLC 80 WC – WLC 152.03

***Booyesen re Ongers River* 1930 Uys WLC 153 WC**

[WLC 153 NOTES]

Judgment Date 1930-10-01. **Court** WC (Victoria West). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Booyesen* Watermeyer 1.20

Quick-Note

Protection of works within protected area

Summary

An owner of land within a protected area applied for permission to construct certain works and for protection in respect of them.

The other owners of protected works within the area consented to the application without exacting any compensation from applicant.

The court granted permission and protection as prayed.

Sources Noted

1912 Act 8 s 16(5) – WLC 153.06
Smartt Syndicate Ltd v Richmond Municipality (2) 1921 Uys WLC 80 WC – WLC 153.01

***Steyl v Upper Modder River Irrigation Board* 1930 Uys WLC 154 O**

[WLC 154 NOTES]

Judgment Date 1930-10-25. **Court** OPD. **Case** 692/1930. **Judge(s)** CL BOTHA, PU FISCHER

Also reported as *Steyl v Upper Modder River Irrigation Board* 1931 OPD 8

Quick-note

Irrigation board – power to levy irrigation rate

Summary

An irrigation board had been in existence for 12 years but had never found it necessary to levy rates on the owners in its district. It negotiated a loan from the government for proposed irrigation works but had not proceeded beyond a preliminary survey. The board financed its annual running expenses by drawing against the loan until the Government put a stop to it and forced the board to pay its expenses by the levying of rates. Thereupon the board in 1928 compiled a schedule of irrigable areas in its district, and in 1929 levied rates for the assessment year 1929-30.

One owner (S) refused to pay his rates on the ground that he was levied on 198 morgen but that the levy was intended to cover the board's debts partly incurred before the 1928 survey, when his farm was still listed as 50 irrigable morgen. Furthermore, he became owner in March 1928, and he argued that he was not liable to pay for board debts incurred before that date. The magistrate held against him.

On appeal, the court firstly rejected the argument that S was not liable for board debts incurred before he became owner, because the rate is not levied on the owner but on the property. Secondly, the fact that annual assessments were not made by the board during previous years, does not prevent it from making an assessment now. Lastly, the levy is to be proportionate to the irrigable areas as determined in the most recent schedule, namely that of 1928. Appeal dismissed.

Sources Noted

1912 Act 8 Chapter 6 – WLC 154.01
1912 Act 8 s 70(3) – WLC 154.06, WLC 154.32
1912 Act 8 s 90 – WLC 154.01, WLC 154.10, WLC 154.15
1912 Act 8 s 91 – WLC 154.03, WLC 154.05, WLC 154.11
1912 Act 8 s 91(1) – WLC 154.13, WLC 154.17, WLC 154.17, WLC 154.18, WLC 154.22, WLC 154.30
1912 Act 8 s 91(2) – WLC 154.17, WLC 154.18, WLC 154.19, WLC 154.20
1912 Act 8 s 92 – WLC 154.11, WLC 154.17
1912 GN 1692(3) r 37 (Irrigation Boards) – WLC 154.16

1912 GN 1692(3) r 38 (Irrigation Boards) – WLC 154.16
Harrisen v Stickney 1849 2 HLC 125 – WLC 154.25
Maddougal v Paterson 1851 11 CB 755, 21 LJ CP 27, 138 ER 672 – WLC 154.31
Smith v Southampton Corporation 1902 2 KB at p 253 – WLC 154.24
ABBOTT *Municipal Corporations* 1 318-23 – WLC 154.31
MAXWELL *Interpretation of Statutes* ed 7 p 213 – WLC 154.21

Wagenaar v Du Plessis (1) 1930 Uys WLC 155 A

[WLC 155 NOTES]

Judgment Date 1930-10-28. **Court** AD. **Judge(s)** JW WESSELS, JS CURLEWIS, T ROOS (Judges of Appeal)

Also reported as *Wagenaar and Another, Appellant v Du Plessis, Respondent* 1931 AD 83

Quick-note

Irrigation works – protection order – effect on existing works – on works to be constructed – on person served with notice – final order without investigation

Summary

Farm A is in the mountains north of Tarkastad. There is no normal flow in the creeks, and several dams were made in them to store the rain water from the mountains. The water would normally flow over the lower farms B, C and others, before reaching the Elands river which flows into the Tarka river which is a tributary of the Great Fish River. The Great Fish River Irrigation Board wanted to construct works in the Tarka River and applied to a water court for a “protection” order. Notices were sent to owners in the catchment area, including the owners of A, B and C, inviting them to appear at the hearing of the court and to “make declarations”, namely to claim protection for their own existing or proposed works. B and C made declarations, and the court granted protection to their works. A did not respond, and raised the spillway of one of her dams.

B and C then applied to the water court for an order that all the water in the water courses on A should flow down to B and C, since their works are now “protected” by the water court order, and those of A are not – in effect, therefore, that the dams on A have to be demolished.

A’s counter-arguments were: that the water in the courses was private water and that she was entitled by law to all of it; that the dams on A were built to stop erosion; that the water court order did not mention A as such, and that the order was therefore not applicable to the water on A; that the water court did not examine the farms in the catchment area but that the order was made by agreement and therefore not binding on those who were not part of it. The water court held in favour of A.

On appeal by B and C directly to the AD:

HELD: Only a water court can enquire and determine whether a water course is or is not a public stream, but that in this case the water court did not determine that fact because it held against B and C in any case.

HELD: The water on A was not excluded from the protection orders;

HELD: An owner in the catchment area on whom a notice is served, is not obliged to declare his works, but if he fails to react, he is debarred from storing surplus water;

HELD: Such owner may construct further works after receiving notice and before the final order of the water court but that he may only maintain his existing works after the final order.

HELD: If the water courses on A are public streams, A was not entitled to raise the spillway.

The matter was accordingly referred back to the water court to determine whether the water on A was public or private.

Sources Noted

1912 Act 8 s 2 “public stream” – WLC 155.73

1912 Act 8 s 14 – WLC 155.48, WLC 155.49, WLC 155.50, WLC 155.51, WLC 155.52, WLC 155.53, WLC 155.55

1912 Act 8 s 15 – WLC 155.31

1912 Act 8 s 16(1) – WLC 155.25

1912 Act 8 s 16(1)(b) – WLC 155.47

1912 Act 8 s 16(2) – WLC 155.28, WLC 155.32, WLC 155.324 WLC 155.58, WLC 155.77, WLC 155.79, WLC 155.80, WLC 155.81, WLC 155.83, WLC 155.84, WLC 155.86

1912 Act 8 s 16(6) – WLC 155.28

1912 Act 8 s 18 – WLC 155.51

1912 Act 8 s 24(a) – WLC 155.53, WLC 155.75

1912 Act 8 s 37(2) – WLC 155.85

1912 GN 982 r 12 (Principles to Guide Water Courts) – WLC 155.20

1912 GN 982 r 13 (Principles to Guide Water Courts) – WLC 155.26

1912 GN 982 r 24 (Principles to Guide Water Courts) – WLC 155.20

Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 155.31

DE VILLIERS JER *Water Law 12: Surplus Water*, 1923 SALJ 40 p 4 – WLC 155.31, WLC 155.33, WLC 155.83

Schultz v Somerset East Municipality 1930 Uys WLC 156 E

[WLC 156 NOTES]

Judgment Date 1930-11-27. **Court** EDLD. **Judge(s)** M NATHAN

Also reported as *Schultz v Somerset East Municipality* 1931 EDL 37

Quick-note

Rain water from house – discharged into municipal furrow – furrow closed – dampness to house – nuisance and damage – servitude of *flumen* – negligence of municipality

Summary

A municipality built a pavement and in the process closed an old ditch in the street which used to be an irrigation furrow. Plaintiff could therefore no longer discharge rain water from the south side of her house into the furrow and she alleged that it caused dampness in the house.

Held that even if plaintiff acquired a prescriptive right to a servitude of *flumen*, the period of prescription was interrupted by alterations which had recently been made to the house and which substantially increased the discharge into the furrow.

Held that the municipality did the work in terms of powers granted to it by the Cape Municipal Ordinance; that there was no proof of its negligence, and therefore no ground for holding it liable for nuisance.

Sources Noted

1912 CAPE Ord 10 s 205 (Cape Municipal) – WLC 156.14

1912 CAPE Ord 10 s 259 (Cape Municipal) – WLC 156.14

Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 156.15

Cape Town Municipality v Paine 1923 AD 287 – WLC 156.15

De Beer v Van der Merwe 1923 Uys WLC 96 A – WLC 156.08, WLC 156.09

Farmer v Robinson Gold Mining Co Ltd 1917 AD 501 – WLC 156.15

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 156.06

ANGELL *Law of Watercourses* 114 p 195 – WLC 156.03

D 9 2 31 – WLC 156.15

GOUDSMIT *Pandecten Systeem* 1 81 – WLC 156.08, WLC 156.09

GROTIUS 2 34 26 – WLC 156.11

MAASDORP *Institutes of Cape Law* 2 p 179 – WLC 156.04

VINNIUS *ad Inst* 2 3 1 – WLC 156.04

VOET 8 2 13 – WLC 156.11

***Harty v Douglas* 1930 Uys WLC 157 WC**

[WLC 157 NOTES]

Judgment Date 1930-12-23. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Harty v Douglas* Watermeyer 1.22

Quick-Note

Riparian land – presumed to share in normal flow – Share acquired by prescription – proof of minimum quantity over 30 years

Summary

Application to settle a dispute re the use, diversion or appropriation of water of a public stream.

Riparian land is entitled to a share of the normal flow of the public stream. A person who claims that the land has lost such right, must prove it.

In a claim for prescriptive rights to use water it is only the quantity used by the claimant during the whole of the period of prescription (i.e. the minimum used by him and his predecessors) to which he can acquire any rights.

Sources Noted

[No sources were noted in the judgment]

***Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality* 1931 Uys WLC 158 WC**

[WLC 158 NOTES]

Judgment Date 1931-03-04. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Transvaal United Trust & Finance Co Ltd* Watermeyer 1.36

Quick-Note

Underground source – not part of public stream – Subdivisions of riparian land retain rights — acquisition of water rights by community by prescription or vetustas interruption – irrigable land of subdivisions of original grant

Summary

At the head of a public stream was a large vlei with waterbearing subsoil. This formed an underground reservoir feeding the stream which emerged below the vlei. In the application for apportionment of the river's water, including the subterranean water, it was contended that the latter was the source of the public stream and being part of the stream was public water. HELD:

- (1) The underground water was not public water because it did not flow in a known and defined channel underground nor was it capable of common use for irrigation.
- (2) The "source" of a stream was where the water "first emerged to view" and that the underground water did not form

part of the stream.

- (3) An owner of land may withdraw water for his own purposes from underground sources unless it is proved that such water is flowing in a known and defined channel leading to the supply of another owner or from the flow in the bed of a public stream.
- (4) Subdivisions of riparian land which are no longer in contact with the stream, do not lose their riparian rights, unless expressly excluded.
- (5) A municipality may represent its inhabitants' riparian rights only by authority under statute or mandate.
- (6) A community cannot in law acquire a servitude to the use of water
- (7) A person claiming rights by immemorial user (*vetustas*) must prove the uninterrupted exercise of those rights throughout the "memory of man", which may be individual recollection or communications made to those still alive by their predecessors. If the origin of the rights claimed was known and found to be only 40 years old, the claim by "immemorial user" had not been established.
- (8) Interruption of prescription by *vis major* is fatal to a claim based on immemorial user.
- (9) Irrigable land on an original grant is limited to the area of suitable land that can be beneficially and directly irrigated on it if such grant had the sole use of the ordinary flow of the stream that would reach its point of diversion when none was being extracted higher up.
- (10) When dealing with apportionment between the subdivisions of an original grant the same principle of limitation of areas applies to the subdivisions as registered when the apportionment is called for.

Sources Noted

1899 CAPE Act 40 r 10 (Water Act) – WLC 158.80
1926 TRANSVAAL Ord 11 s 62 (Local Government) – WLC 158.94
1926 TRANSVAAL Ord 11 s 80 (Local Government) – WLC 158.94
1908 TRANSVAAL Act 27 s 2 "riparian farm" Irrigation Act – WLC 158.54, WLC 158.77
1912 Act 8 s 2 "public stream" – WLC 158.45
1912 Act 8 s 2 "riparian land" – WLC 158.53, WLC 158.59, WLC 158.178
1912 Act 8 s 2 proviso – WLC 158.57
1912 Act 8 s 9 – WLC 158.46
1912 Act 8 s 12 – WLC 158.171
1912 Act 8 s 32(b) – WLC 158.01
1912 GN 982 r 9 pr (Principles to Guide Water Courts) – WLC 158.172
1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 158.173, WLC 158.177
1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 158.173
1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 158.180
Boshoff v Reinhold & Co 1920 AD 29 – WLC 158.124
Divisional Council of Fraserburg v Van Wyk 1927 CPD 285 – WLC 158.149
Greeff v Keller 1906 C (23 SC) 18 – WLC 158.57, WLC 158.62
Louw v Louw 1921 CPD 320 – WLC 158.73
Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 158.146, WLC 158.160
Municipal Council of Bulawayo v Bulawayo Water Works Ltd 1915 AD 611 – WLC 158.103
Peacock v Hodges 1876 C (6 Buch) 65 – WLC 158.153, WLC 158.160
Retief v Louw 1874 C (4 B) 165 – WLC 158.57
Sadien v Vosper 1914 Uys WLC 18 WC – WLC 158.75
Union Government v Marais 1920 Uys WLC 68 A – WLC 158.50
D 8 3 17 – WLC 158.65
D 8 3 23 3 – WLC 158.71
D 8 3 25 – WLC 158.70
D 38 2 24 – WLC 158.64
D 39 3 8 – WLC 158.67
D 39 3 9 1 – WLC 158.67
D 39 3 9 2 – WLC 158.67
D 39 3 9 10 – WLC 158.67
D 39 3 10 1 – WLC 158.66
D 39 3 10 2 – WLC 158.66
D 39 3 17 4 – WLC 158.68
D 43 12 2 – WLC 158.65
D 43 20 1 8 – WLC 158.48
GLUCK 10 (8 50 5) – WLC 158.109, WLC 158.72, WLC 158.145
GOUDSMIT *Pandecten Systeem* 1 81 – WLC 158.145
GOUDSMIT *Pandecten Systeem* 1 195 – WLC 158.143
JUTA *Water Rights* ed 1907 p 16-18 – WLC 158.57, WLC 158.81
MAASDORP *Institutes of SA Law* 2 (ed 1903) – WLC 158.58
MAASDORP *Institutes of SA Law* 2 (ed 1923) p 122-3 – WLC 158.57, WLC 158.59, WLC 158.60
MAASDORP *Institutes of SA Law* 2 (ed 1923) p 182-3 – WLC 158.111
MAASDORP *Institutes of SA Law* 2 (ed 1923) p 231-2 – WLC 158.147
MAASDORP *Institutes of SA Law* 2 (ed 1923) p 208 – WLC 158.148
VOET 8 1 2 – WLC 158.108
VOET 8 1 3 – WLC 158.108
WARE *Roman Water Law* – WLC 158.64

Hall & Sons Ltd re Gladdespruit 1931 Uys WLC 159 WC

[WLC 159 NOTES]

Judgment Date 1931-03-30. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Hall & Sons Ltd Watermeyer* 1.27

Quick-Note

Land riparian on tributary and main stream – apportionment of tributary – catchment areas

Summary

Application for apportionment. HELD –

- (1) A riparian owner may divert water from the stream on to land outside the catchment area of the stream only with leave of the court
- (2) Such land cannot be brought into competition with riparian land which lies within the catchment area for the purpose of claiming a share of the water when it is being apportioned.
- (3) If a piece of land is within the catchment areas of a tributary and its main stream, and the tributary is being apportioned, only the part within the catchment of the tributary is to be included in that apportionment.
- (4) But If the main stream is being apportioned, the catchments of tributaries is included and the whole farm may be brought into competition.
- (5) There will be an abatement in respect of that portion which receives its water from the tributary, for such land is served by another “source of supply”

Sources Noted

1912 Act 8 s 12 – WLC 159.26, WLC 159.27, WLC 159.33

1912 Act 8 s 14 – WLC 159.26, WLC 159.27, WLC 159.30, WLC 159.33

1912 Act 8 s 15 – WLC 159.26, WLC 159.28, WLC 159.30

1912 Act 8 s 16 – WLC 159.26, WLC 159.28, WLC 159.30

1912 Act 8 s 18 – WLC 159.26

1912 Act 8 s 23 – WLC 159.18, WLC 159.21, WLC 159.21, WLC 159.22, WLC 159.24, WLC 159.27, WLC 159.31, WLC 159.32, WLC 159.33, WLC 159.34, WLC 159.37, WLC 159.40

1912 Act 8 s 23(1)(b) – WLC 159.18, WLC 159.39, WLC 159.40

1912 GN 982 r 3(c) (Principles to Guide Water Courts) – WLC 159.28

1912 GN 982 r 15(a) (Principles to Guide Water Courts) – WLC 159.30

1912 GN 982 r 19(b) (Principles to Guide Water Courts) – WLC 159.31

1912 GN 982 r 23 (Principles to Guide Water Courts) – WLC 159.26, WLC 159.34

1912 GN 982 r 25 (Principles to Guide Water Courts) – WLC 159.26, WLC 159.42

1912 GN 982 r 27 (Principles to Guide Water Courts) – WLC 159.26, WLC 159.34

DE VILLIERS JER *Water Law 10: Secondary Use of Normal Flow further Considered*, in SALJ 1922 39 276 – WLC 159.21, WLC 159.29

Pienaar v Treasure Trove Diamonds Ltd 1931 Uys WLC 160 A

[WLC 160 NOTES]

Judgment Date 1931-05-05. **Court** AD. **Judge(s)** J DE VILLIERS (Chief Justice), JW WESSELS, JS CURLEWIS, J STRATFORD, T ROOS (Judges of Appeal)

Also reported as *Pienaar, Appellant v Treasure Trove Diamonds Ltd, Respondent* 1931 AD 354

Quick-note

Water rights – claimholder on alluvial digging – right to sink a well on the claim

Summary

An alluvial digging was proclaimed on the property of T, who obtained from the mining commissioner the exclusive right (in terms of the Precious Stones Act, 1927) to supply water to the diggers.

One of the diggers (P) sunk a well on his claim, and T applied for an interdict against him. The TPD refused it for the reason that digging a well on a claim is an operation incidental to mining and therefore within the terms of the claim licence; in any case he has an implied right to supply himself with water from his own claim. On appeal to a full bench of the TPD, the order was reversed and the interdict granted. On appeal by P to the AD:

Held that the Precious Stones Act gives a claim holder on an alluvial digging no right to sink a well on his claim for the purpose of finding water. The interdict was confirmed.

Sources Noted

1912 Act 8 s 8 – WLC 160.12

1919 Act 15 (Precious Stones (Alluvial) Amendment) – WLC 160.10

1927 Act 44 Chapter 10 (Precious Stones) – WLC 160.02, WLC 160.10, WLC 160.15, WLC 160.17, WLC 160.29, WLC 160.31, WLC 160.34, WLC 160.39, WLC 160.41, WLC 160.43, WLC 160.50

1927 Act 44 s 4(3) (Precious Stones) – WLC 160.43

1927 Act 44 s 23 (Precious Stones) – WLC 160.11, WLC 160.13, WLC 160.23, WLC 160.25

1927 Act 44 s 29 (Precious Stones) – WLC 160.24

1927 Act 44 s 30 (Precious Stones) – WLC 160.48

1927 Act 44 s 31 (Precious Stones) – WLC 160.47

1927 Act 44 s 91 (Precious Stones) – WLC 160.17, WLC 160.18, WLC 160.20, WLC 160.23, WLC 160.28, WLC 160.32, WLC 160.34, WLC 160.35, WLC 160.36, WLC 160.38

1927 Act 44 s 92 (Precious Stones) – WLC 160.20, WLC 160.23, WLC 160.34, WLC 160.37

1927 Act 44 s 92(3) (Precious Stones) – WLC 160.22, WLC 160.31
1927 Act 44 s 93 (Precious Stones) – WLC 160.27
1927 Act 44 s 94 (Precious Stones) – WLC 160.30
1927 Act 44 s 95 (Precious Stones) – WLC 160.47
1927 Act 44 s 103(6) (Precious Stones) – WLC 160.19
1927 Act 44 s 108(1) (Precious Stones) – WLC 160.16
1927 Act 44 s 116 (Precious Stones) – WLC 160.26, WLC 160.34, WLC 160.42

Union Government v Chatwin 1931 Uys WLC 161 T

[WLC 161 NOTES]

Judgment Date 1931-05-29. **Court** TPD. **Judge(s)** FET KRAUSE, L GREENBERG

Also reported as *Union Government (Minister of Finance) v Chatwin 1931 TPD 347*

Quick-note

Irrigation loan – repayment – set-off against counterclaim not authorised by Act

Summary

The Government claimed repayment of an irrigation loan from C. C pleaded set-off, alleging that she had a counterclaim against the government, and that the Minister had agreed to set off the loan against the counterclaim. The government excepted to the plea, arguing that the Irrigation Act 1912 does not authorise the Minister to accept repayment of a loan in that manner. The court upheld the exception.

Sources Noted

1912 Act 8 Chapter 8 – WLC 161.04
1912 Act 8 s 118 – WLC 161.04
1912 Act 8 s 118(2)(b)(ii) – WLC 161.05
1912 Act 8 s 125 – WLC 161.06

Smuts v Faure 1931 Uys WLC 162 C

[WLC 162 NOTES]

Judgment Date 1931-08-31. **Court** CPD. **Judge(s)** FG GARDINER (Judge President), EF WATERMEYER, HM LOUWRENS

Also reported as *Smuts v Faure and Others 1931 CPD 544*

Quick-note

Water furrow – Agreement to divide water – Owner tampering with sluice – reasonable damages to be awarded

Summary

Water from fountains in the Witzenbergen mountains flowed in a furrow over farms K and M belonging to S. Across the furrow was a cement weir with a sluice consisting of a plank. On the bottom left side of the plank there was a one-inch-square hole through which water flowed down to M; on the top right side of the plank, 14 inches higher than the hole, there was a concave cut-out in the plank, over which the excess water flowed to K and other lower farms. The distribution of the water was agreed to by the former owners of the farms but the agreements were registered against the title deed of M only.

When S blocked up the concave outflow to give a greater head of water and thereby to force more water through the hole to M, the other owners (F) claimed an interdict and damages in a water court. The court granted the interdict but gave absolution on the claim for damages. On appeal:

Held that S may not obstruct the overflow because according to the agreement he was entitled only to a free flow through the hole.

Held that if the quantum of damages was not proved, the water court should have awarded a fair and reasonable amount.

Sources Noted

1912 Act 12 s 133 – WLC 162.19
Aliwal North Municipality v Jeffares 1917 Uys WLC 51 C – WLC 162.26
Burger v Schwartz 1907 C (24 SC) 650 – WLC 162.13
Gavin v Fourie 1912 Uys WLC 8 C – WLC 162.24
Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 162.21

Wagenaar v Du Plessis 1931 Uys WLC 163 WC

[WLC 163 NOTES]

Judgment Date 1931-09-02. **Court** WC (Cape Town). **Judge(s)** HM LOUWRENS.

Also reported as *Wagenaar and Another v Du Plessis and Another Watermeyer 1.75*

Quick-Note

Public stream – common user – regular flow.

Summary

A stream is a public stream if it is capable of being applied to the common use of riparian owners for the purposes of irrigation.

Common use means that there must be a reasonable expectation of sufficient water to produce crops economically and regularly.

A channel which merely drained surface water flowing only during and for a very short periods after heavy rain, is not a public stream.

Sources Noted

1912 Act 8 s 2 “surplus water” – WLC 163.02

Great Fish River Irrigation Board v Southey (1) 1927 Uys WLC 125 WC – WLC 163.24

Great Fish River Irrigation Board v Southey (2) 1928 Uys WLC 141 WC – WLC 163.03

Nel, R v* 1931 Uys WLC 164 T*[WLC 164 NOTES]**

Judgment Date 1931-09-21. **Court** TPD. **Judge(s)** CE BARRY, GJ MARITZ

Also reported as *Rex v Nel* 1931 TPD 486

Quick-note

Offence of altering or interfering with irrigation work – irrigation board regulation not *ultra vires* for providing the same

Summary

Section 133(2) makes it an offence for a person without lawful right or authority to obstruct an irrigation work or interfere with any irrigation work or alter the flow of a public stream.

The Les Marais irrigation board had an almost similar regulation (r 15). When Nel was charged under r 15 for diverting water in the board’s canal, his defence was that the board’s regulation was *ultra vires* because it covered the same ground as the section of the Act, and because it was too widely framed.

The court rejected both arguments, the latter for the reason that r 15 is not too wide if it is read with r 12 which provides that the interference should be without lawful right or authority.

Sources Noted

1912 Act 8 s 9(5) – WLC 164.03

1912 Act 8 s 133 – WLC 164.06, WLC 164.07, WLC 164.08, WLC 164.11

1912 Act 8 s 133(2) – WLC 164.01

1924 GN 327 r 12 (Les Marais Irrigation Board Bylaws) – WLC 164.10, WLC 164.11

1924 GN 327 r 15 (Les Marais Irrigation Board Bylaws) – WLC 164.01, WLC 164.02, WLC 164.04, WLC 164.08, WLC 164.09, WLC 164.10, WLC 164.11

Rex v Lotz 1927 TPD 836 – WLC 164.07

Southern Life Association v Du Plessis* 1931 Uys WLC 165 WC*[WLC 165 NOTES]**

Judgment Date 1931-11-13. **Court** WC (Oudtshoorn). **Judge(s)** EF WATERMEYER.

Also reported as *Southern Life Association v Du Plessis* Watermeyer 1.81

Quick-Note

Right to water by prescription – Proof of quantity abstracted over period

Summary

In a dispute concerning the use, diversion or appropriation of water, a party claimed that he had acquired by prescription the right to use water from the stream. HELD –

(1) The claimant has to prove that he had regularly abstracted a definite quantity of water from the river. But since floods altered the nature of the river bed so that the site of the diversion weir had to be moved; the weir was not watertight; and the quantity of water diverted by it varied according to the rainfall; therefore regular abstraction of a definite quantity of water had not been proved.

(2) If a lower owner claims damages from an upper owner for being deprived of his water, the onus rests on the lower owner to show the unlawful quantity taken by the upper owner.

Sources Noted

[No sources were noted in the judgment]

Harber, R v 1931 Uys WLC 166 T

[WLC 166 NOTES]

Judgment Date 1931-12-18. **Court** TPD. **Judge(s)** BA TINDALL, S SOLOMON

Also reported as *Rex v Harber* 1932 TPD 69

Quick-note

Interfering with distribution of water

Summary

Members of a river board agreed on how to distribute the water in various furrows. A resolution was duly passed by the board notifying the persons concerned of the arrangement. The appellant (H) formerly used water from two furrows, but the agreements and resolution now restricted him to one of those furrows.

When he after a while again started using the water from the other furrow, he was charged with interfering with the distribution of water in contravention of section 133(1)(b) of the Act. He pleaded that the agreements and board resolution were invalid due to misrepresentation, non-fulfilment of a condition (that a certain dam would be demolished), that the resolution was not in the form of a board regulation and therefore not binding, and that he was a tenant of government land to which the board's orders were not applicable.

HELD: The resolution was in effect a regulation by the board under s 62(b) and was binding without the publishing of a by-law or regulation in terms of s 76(1); that H was a member and even chairman of the board when the agreements and resolutions were made, which prevented him from reneging; that the land which he rented was within the area of the board and although government land, it is subject to the board's jurisdiction.

Sources Noted

1912 Act 8 s 62 – WLC 166.16, WLC 166.19, WLC 166.24, WLC 166.24

1912 Act 8 s 62(a) – WLC 166.19

1912 Act 8 s 62(b) – WLC 166.20

1912 Act 8 s 63 – WLC 166.24

1912 Act 8 s 65 – WLC 166.14

1912 Act 8 s 76(1) – WLC 166.18

1912 Act 8 s 133 – WLC 166.24

1912 Act 8 s 133(1)(b) – WLC 166.01, WLC 166.25

1912 Act 8 s 133(2) – WLC 166.18

1912 GN 1692(2) r 30 (River Boards) – WLC 166.17

1912 GN 1692(2) r 46-53 (River Boards) – WLC 166.19

Still, R v 1928 Uys WLC 135 T – WLC 166.25

Allen v Tamsen 1932 Uys WLC 167 WC

[WLC 167 NOTES]

Judgment Date 1932-03-17. **Court** WC (Pretoria). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Allen and Louw v Tamsen and Van Biljon* Watermeyer 1.85

Quick-Note

Public stream – common user for irrigation – tributary and main stream distinguished – Use of water outside catchment area – irrigable land

Summary

Application in a dispute and for apportionment of a public stream. HELD –

- (1) A public stream is a stream the water of which is (inter alia) “capable of being applied to the common use of riparian owners for the purposes of irrigation”.
- (2) Common use for irrigation depends on the circumstances such as the type of farming practised along the banks.
- (3) Main stream and tributary, are distinguished (inter alia) by comparative length of course, volume of flow, permanence and character of channel, extent of catchment area, direction of flow at confluence and the nomenclature of the streams.
- (4) The water of a public stream may be used beyond its watershed only with the permission of the court, which will be granted if the water of the stream is not or cannot be utilised within the catchment area.
- (5) Land which cannot be directly and beneficially irrigated with all the water of the stream which would be available at the point of diversion if no upper irrigation were taking place, cannot compete as “irrigable land” in an apportionment
- (6) Costs of the apportionment were awarded against the respondent who failed to prove his allegation that applicant was not entitled to any water.

Sources Noted

1912 Act 8 s 2 “public stream” – WLC 167.20

1912 Act 8 s 8(1) – WLC 167.10

1912 Act 8 s 10(4) – WLC 167.07

1912 Act 8 s 12 – WLC 167.35

1912 Act 8 s 23 – WLC 167.36

1912 Act 8 s 32 – WLC 167.01

1912 Act 8 s 32(a) – WLC 167.62

1912 Act 8 s 32(b) – WLC 167.62
1917 GN 459 r 37 (Water Court Rules) – WLC 167.01
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 167.53
1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 167.38
Ball v Erasmus 1927 Uys WLC 130 WC – WLC 167.49
De Wit & Vivier v Swart 1910 AD 239 – WLC 167.22
Hall & Sons Ltd re Gladdespruit 1931 Uys WLC 159 WC – WLC 167.34

***Irvin re Steelpoort River* 1932 Uys WLC 168 WC**

[WLC 168 NOTES]

Judgment Date 1932-05-20. **Court** WC (Aapiesdoorndraai). **Judge(s)** C JEPPE (Water Court Judge).

Also reported as *Ex parte Irvin* Watermeyer 1.96

Quick-Note

Apportionment area – extent determined by applicant – may be extended at request of other owners or by court

Summary

An apportionment need not be made for the farms along the whole length of the stream.

The area of the apportionment is as a rule left to the choice of the applicant but such area may be extended at the request of owners who have been cited if other owners outside its boundaries might be seriously affected.

The area may also be extended at the instance of the court.

Sources Noted

1917 GN 459 r 45 (Water Court Rules) – WLC 168.06

***Prinsloo v Luipaardsvlei Estates & GM Co Ltd* 1932 Uys WLC 169 W**

[WLC 169 NOTES]

Judgment Date 1932-10-14. **Court** WLD. **Judge(s)** BA TINDALL

Also reported as *Prinsloo v Luipaardsvlei Estates & GM Co Ltd* 1933 WLD 6

Quick-note

Riparian owner – Pollution of stream by mine – Portion of farm rendered useless – Damages and interdict

Summary

One of the sources of the Rietvlei spruit is on the farm Luipaardsvlei 8, whence it flows down over the farm Rietvlei. A riparian owner (P) alleged that a mining company (L) was polluting the spruit by discharging into it and on to his farm poisonous, injurious water, slimes, sands, and other deleterious matter; that it was depriving him of the use of the spruit water needed for his household, animals and irrigation; that it was poisoning and silting up his soil, vegetation and vleis, making it infertile and useless for agriculture and grazing; that L's acts are also a contravention of r 22 and r 23 under Act 35 of 1905 and r 7 under Act 12 of 1911. He therefore claimed an interdict and damages. L pleaded that most of the pollution was caused by other mines. The facts from the pleadings and the evidence were as follows.

- (1) Since 1925 the waste material after the process of gold extraction came away as slimes and sand. The slimes was deposited in a "slimes dam," which was not a dam in the ordinary sense of the term, but an area into which the water containing slimes from the recovery works was run. The water was then drained off, leaving a layer of slimes, the various layers settling in course of time into a more or less cohesive mass of fine waste material. The waste (known as "sands") was dry matter from the reduction plant, and was dumped in a loose heap known as a "sand dump."
- (2) The Lancaster dam in the spruit in particular caught up a great quantity of slimes from L's mine. In June 1925 L applied to the mining commissioner for permission to de-water the Lancaster water dam because soakage from the dam found its way into its underground workings; the water in the dam was not likely to be required for mining purposes; and the dam wall was a menace in case it should break. The mining commissioner had no objection but stated that L must accept all risk of damage caused by the flow of the acid water of the dam over any agricultural or other occupied land. L then cut through the dam wall in the line of the stream bed.
- (3) About a year after the breach of the dam, the first complaint was made to the mining commissioner that slimes were being deposited on Rietvlei. He investigated in terms of r 23 under Act 35 of 1908 and called upon L to abate the nuisance but L repudiated liability for slimes coming from the Lancaster dam. By this time a considerable quantity of slimes had been deposited on Rietvlei. In February 1927 L erected a partial closing of the breach in the wall but a storm carried the work away and the gap is still there.
- (4) There were two other mines in the area which also produced slimes: the Randfontein Estates mine's water contained no sulphocyanide, ferro cyanide, sewage or acid; but the West Rand Company's water drained in furrows from its slimes dam and slimes was deposited in large quantities on the abutting land: it was foul, not potable by human beings and contained sulphocyanide.
- (5) L's water drained into the spruit and the Lancaster dam from its current slimes dams as well as from its old slimes dams by seepage and also from its native compound and its underground works (the latter being known as "sludge).

- (6) The land adjacent to the Rietvlei spruit was at the time of the trial “smothered with slimes” over a considerable area and in places the deposit was at least three feet deep.
- (7) Before mining commenced on Luipaardsvlei 8, the spruit had its origin in a number of small springs forming a vlei, which extended for a distance on that farm, and then developed into a running stream; and the natural water which flowed along the spruit to where the Lancaster dam was subsequently built was public water, forming the source of a public stream within the meaning of the Irrigation Act 8 of 1912.
- (8) A part of L’s slimes dam No 7 was built over the head of a creek, which was one of the sources of the spruit and was a weakness of its structure.
- (9) Sludge was daily being discharged into the creek and ultimately reached Rietvlei farm, one-third of it being deleterious sediment.
- (10) The combined stream from all sources discharged by L into the spruit was very acid: it contained a high concentration of dissolved matter, was useless for any purpose, harmful to drink, unsuitable for consumption by animals, and had a harmful effect on agricultural land.
- (11) Before the breaching of the Lancaster dam, the water in the spruit was suitable for cattle, and very little mine waste was carried on to Rietvlei.
- (12) Damage for the silting before 1928 was irrecoverable because of prescription.
- (13) The damage caused to P was due to the negligent manner in which L and the other 2 mines discharged waste water into the spruit, each acting independently of each other.

HELD: Judgment against L for damages and an interdict against further pollution

Sources Noted

1883 TRANSVAAL Law 1 1884 Supplement s 13 (Precious Metals and Precious Stones Act – “1883 Gold Law”) – WLC 169.08
 1885 TRANSVAAL Law 8 s 17 (Precious Metals and Precious Stones {“1885 Gold Law”}) – WLC 169.09
 1885 TRANSVAAL Law 8 s 47 (Precious Metals and Precious Stones {“1885 Gold Law”}) – WLC 169.09, WLC 169.10, WLC 169.11
 1898 TRANSVAAL Law 15 s 119 (Precious Metals and Precious Stones {“1898 Gold Law”}) – WLC 169.11
 1908 TRANSVAAL Act 27 s 83 (Irrigation) – WLC 169.15
 1908 TRANSVAAL Act 35 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.01, WLC 169.07, WLC 169.17
 1908 TRANSVAAL Act 35 Chapter 8 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.20
 1908 TRANSVAAL Act 35 r 14-23 (Precious and Base Metals Act – “1908 Gold Law”) – WLC 169.12, WLC 169.13, WLC 169.19, WLC 169.21, WLC 169.22, WLC 169.24, WLC 169.28
 1908 TRANSVAAL Act 35 s 1 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.14
 1908 TRANSVAAL Act 35 s 3 (Precious and Base Metals Act – “1908 Gold Law”) – WLC 169.19
 1908 TRANSVAAL Act 35 s 30(b) (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.14
 1908 TRANSVAAL Act 35 s 57 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.12
 1908 TRANSVAAL Act 35 s 58 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.12
 1908 TRANSVAAL Act 35 s 66 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.12, WLC 169.22
 1908 TRANSVAAL Act 35 s 132 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.12
 1908 TRANSVAAL Act 35 Schedule 3 (Precious and Base Metals {“1908 Gold Law”}) – WLC 169.21
 1912 Act 8 s 137 – WLC 169.16, WLC 169.20
Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 – WLC 169.23, WLC 169.28
Lewin v Vogelstruis Estates 1921 WLD 66 – WLC 169.30
Rylands v Fletcher LR 3 HL 330, 37 LJ Ex 161 – WLC 169.38
Salisbury Municipality v Joola 1911 AD 178 – WLC 169.01
Stollmeyer v Petroleum Development Co 1918 AC 500 – WLC 169.53
Young & Co v Bankier Distillery Co 1893 AC 691 – WLC 169.01, WLC 169.02, WLC 169.04
 VOET 39 3 2 – WLC 169.03

***Taylor re Sabalele Stream* 1932 Uys WLC 170 WC**

[WLC 170 NOTES]

Judgment Date 1932-11-29. **Court** WC (Pretoria). **Judge(s)** I CURLEWIS (Acting Water Court Judge).

Also reported as *Ex parte Taylor* Watermeyer 1.97

Quick-Note

Public stream – defined channel – acquisition of water by lawful operations

Summary

A stream flowed through a vlei which had defined limits and which was 50 to 70 yards wide.

Held, in an application for an apportionment –

- (1) The vlei was a “defined channel” of the stream and therefore part of the “public stream”;
- (2) Trenches cut in the vlei to increase the supply of water and the appropriation thereof, is not an acquisition of water by “lawful operations”

Sources Noted

1912 GN 982 r 8 (Principles to Guide Water Courts) – WLC 170.03
Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 170.17

***Varatha v Coronation Brick & Tile Co Ltd* 1932 Uys WLC 171 N**

[WLC 171 NOTES]

Judgment Date 1932-12-21. **Court** NPD. **Judge(s)** AAR HATHORN

Also reported as *Varatha v Coronation Brick and Tile Co Ltd* 1932 NPD 774

Quick-note

Dispute or claim as to water rights – jurisdiction

Summary

C used water in a furrow running over its land. A lower land owner (V) alleged that she had a right to the water by virtue of the grant of her land and she applied to the supreme court for an interdict to restrain C from using the water. C's defence was that the furrow was in existence prior to 1875 and had acquired the status of a public stream; that this was a "dispute or claim as to water rights" from a public stream within the meaning of s 34(1) of Act of 1912; and that accordingly only a water court had jurisdiction in the matter.

The court agreed with C.

Sources Noted

1912 Act 8 s 34(1) – WLC 171.01

1916 Act 26 (Irrigation Amendment) – WLC 171.10

Calitz v Lyle 1928 Uys WLC 136 C – WLC 171.11

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 171.02, WLC 171.09

Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 171.10

***Du Plessis Estates Ltd v SA Railways & Harbours* 1933 Uys WLC 172 E**

[WLC 172 NOTES]

Judgment Date 1933-02-23. **Court** EDL. **Judge(s)** TL GRAHAM (Judge President)

Also reported as *Du Plessis Estates Ltd v South African Railways and Harbours* 1933 EDL 140

Quick-note

Servitude to water from a spring – dominant owner constructing works to extract more water from spring – interpretation of servitude – unlawful to alter natural flow – interdict and damages.

Servient owner may extract water elsewhere on farm unless he can foresee that spring's natural flow will be affected.

Summary

The Railways acquired and registered a servitude over D's farm which allowed it all the water issuing from a certain fountain. The "fountain" consisted of 3 boreholes from which the water welled up to the surface. D was forbidden by the servitude to bore for water within a certain area near the fountain or to interfere with the free flow of water from the fountain.

The railways deepened the boreholes, added four more boreholes and put a syphon into one of the boreholes. This affected D's water supply elsewhere on the farm.

D in turn sunk a borehole outside the area prohibited by the servitude, and this allegedly affected the water of the fountain.

D applied for an interdict to restrain the railways from using a syphon, and damages; and the railways counterclaimed for an interdict against D to prohibit him from using his borehole, and damages.

HELD on D's claim: (1) the servitude included only the water issuing naturally from the three boreholes in existence at the date of the agreement and not the water from the source of the spring (whatever it may be); and (2) the defendant Railways had no right to bore at the fountain or to increase the depth of the boreholes. The requested interdict and damages was therefore granted against the Railways..

HELD on the Railways' counterclaim: the Railways extracted more water from the fountain than they were entitled to, and they could therefore not prove that D abstracted water to which the Railways would have been entitled under the servitude.

Semle: A servient owner may not extract water from a place on his farm where he has reasonable grounds for believing that his operations would affect the free flow of the dominant owner's water supply (ie from the fountain, in this case).

Sources Noted

1912 Act 8 s 34(1) – WLC 171.01

1916 Act 26 (Irrigation Amendment) – WLC 171.10

Brain v Marfell 41 LT 456 – WLC 172.11

Calitz v Lyle 1928 Uys WLC 136 C – WLC 171.11

De Bruijn v Louw 1905 ORC 11 – WLC 172.49

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 171.02, WLC 171.09

Glatthaar v Van Rensburg 1925 Uys WLC 112 T – WLC 172.35

Keewatin Power Co v Lake of the Woods Milling Co 1930 AC 640 – WLC 172.38

Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd 1919 Uys WLC 66 C – WLC 172.24, WLC 172.49

Snijman v Boshoff 1905 ORC 1 – WLC 172.20, WLC 172.49

Taylor v Corporation of St Helens 6 ChD 267 – WLC 172.38

Union Government v Marais 1920 Uys WLC 68 A – WLC 172.26, WLC 172.49

Van Heerden v Coetzee 1914 Uys WLC 20 A – WLC 172.34
Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 171.10
D 8 3 15 – WLC 172.34
HALSBURY *Laws of England* 2 504 p 250 – WLC 172.28
VOET 8 4 16 – WLC 172.23, WLC 172.34

***Biggs re Sundays River* 1933 Uys WLC 173 WC**

[WLC 173 NOTES]

Judgment Date 1933-06-26. **Court** WC (Graaff-Reinet). **Judge(s)** EF Watermeyer (Water Court Judge)

Also reported as *Ex parte Biggs and Others* Watermeyer 1.100

Quick-Note

Construction of water works – time limit

Summary

Application for extension of time for constructing storage works, held –

- (1) A water court has no power to extend the time limit within which works for the storage of surplus water must be constructed.
- (2) The water court had given a final judgment based on agreement between the parties that all declarants should have 10 years within which to construct works for the storage of surplus water, and the court can extend the period beyond 10 years only with the consent of all parties concerned.

Sources Noted

1912 Act 8 s 16(1) – WLC 173.14, WLC 173.16

1912 Act 8 s 16(1)(b) – WLC 173.10, WLC 173.11, WLC 173.16

1912 Act 8 s 16(2) – WLC 173.07, WLC 173.22

1912 Act 8 s 16(4) – WLC 173.16

Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board 1924 Uys WLC 101 WC – WLC 173.02

***Hemmingson re Waterkloof River* 1933 Uys WLC 174 WC**

[WLC 174 NOTES]

Judgment Date 1933-09-14. **Court** WC (Rustenburg). **Judge(s)** JER de VILHIES (Acting Water Court Judge).

Also reported as *Ex parte Hemmingson* Watermeyer 1.105

Quick-Note

Application for apportionment – joining of all portions of farm

Summary

Application in a dispute as to the use, division or appropriation of water, and alternatively for apportionment by an applicant who owns a portion of a farm.

Held: The applicant should join the owners of all the other portions as applicants. If they are unwilling to be joined as applicants he should cite them as nominal co-respondents.

Sources Noted

1917 GN 459 r 44 (Water Court Rules) – WLC 174.05

1917 GN 459 r 45 (Water Court Rules) – WLC 174.09

1917 GN 459 r 46 (Water Court Rules) – WLC 174.10

***Geduld Proprietary Mines Ltd v New Springs Collieries Ltd* 1933 Uys WLC 175 T**

[WLC 175 NOTES]

Judgment Date 1933-12-05. **Court** TPD. **Judge(s)** BA TINDALL (Acting judge President), L GREENBERG

Also reported as *Geduld Proprietary Mines Ltd v New Springs Collieries Ltd* 1934 TPD 104

Quick-note

Water from mine – coal mining rights implied mine's right to use water – but surplus water still belonged to land owner

Summary

A coal mining lease allowed the lessee “to pump out the water that may be found in the coal mines and to let it flow away.”

The lessee conveyed the water which it pumped out of the mine in a pipeline to neighbouring property and sold it to the mine on that property. But the landowner (lessor) said that the lessee had to let the mine water flow away naturally on the surface of the land. The parties then applied to court for a stated case on the interpretation of the lease.

Held: the clause by implication conferred the right to use the water for purposes of coal mining. The lessee was therefore not entitled to convey the water off the property by artificial means or to sell it.

Held that the underground water was not in defined channels and was not public water and s 26 of Act 8 of 1912 was not applicable to it: the water therefore belonged to the land owner. Nor did he in the mining lease abandon his right to the ownership of the water.

Sources Noted

1898 TRANSVAAL Law 15 (Precious Metals and Precious Stones {"1898 Gold Law"}) – WLC 175.09

1912 Act 8 s 26 – WLC 175.08

Barnabas Plein & Co v S Jacobson & Son 1928 AD 25 – WLC 175.14

Reigate v Union Manufacturing Co 1918 1 KB 592, 1918-19 All ER Repr 143, 118 LT 479, 18 LTR 483 – WLC 175.14

***Coetser re Spekboom River* 1933 Uys WLC 176 WC**

[WLC 176 NOTES]

Judgment Date 1933-12-30. **Court** WC (Pretoria). **Judge(s)** DE VILLIERS (Acting Water Court Judge).

Also reported as *Ex parte Coetser* Watermeyer 1.107

Quick-Note

Apportionment – land outside catchment area

Summary

In an application for apportionment, held –

- (1) An owner of riparian land may also irrigate his land which is outside the catchment area of the stream provided he causes other riparian owners no harm beyond that which results from a reasonable consumption of the water by irrigation.
- (2) Such owner may bring into competition all his “irrigable land” whether it lies within the catchment area of the stream or outside it.

Sources Noted

1906 CAPE Act 32 s 3(1) – WLC 176.58

1906 CAPE Act 32 s 6 – WLC 176.58

1912 Act 8 Chapter 2 – WLC 176.45

1912 Act 8 s 2 “*riparian land*” – WLC 176.42, WLC 176.65, WLC 176.112

1912 Act 8 s 10(1) – WLC 176.45

1912 Act 8 s 10(4) – WLC 176.34

1912 Act 8 s 12 – WLC 176.32, WLC 176.34, WLC 176.35, WLC 176.46, WLC 176.48, WLC 176.110, WLC 176.112

1912 Act 8 s 14 – WLC 176.35, WLC 176.38, WLC 176.40, WLC 176.42, WLC 176.49, WLC 176.112

1912 Act 8 s 15 – WLC 176.49

1912 Act 8 s 16 – WLC 176.49

1912 Act 8 s 23 – WLC 176.23, WLC 176.24, WLC 176.25, WLC 176.26, WLC 176.27, WLC 176.28, WLC 176.30, WLC 176.32, WLC 176.33, WLC 176.34, WLC 176.36, WLC 176.37, WLC 176.38, WLC 176.39, WLC 176.40, WLC 176.48, WLC 176.50, WLC 176.78, WLC 176.86, WLC 176.110, WLC 176.111, WLC 176.113

1912 Act 8 s 23(1) – WLC 176.29, WLC 176.30, WLC 176.31

1912 Act 8 s 32(b) – WLC 176.01, WLC 176.04, WLC 176.66

1912 Act 8 s 138 – WLC 176.86

1912 GN 982 r 3(c) (Principles to Guide Water Courts) – WLC 176.68, WLC 176.69, WLC 176.74

1912 GN 982 r 3(d) (Principles to Guide Water Courts) – WLC 176.74

1912 GN 982 r 7 (Principles to Guide Water Courts) – WLC 176.75

1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 176.94

1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 176.85

1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 176.80

1912 GN 982 r 23 (Principles to Guide Water Courts) – WLC 176.33

1912 GN 982 r 25 (Principles to Guide Water Courts) – WLC 176.37

1912 GN 982 r 27 (Principles to Guide Water Courts) – WLC 176.33, WLC 176.38, WLC 176.40

Allen v Tamsen 1932 Uys WLC 167 WC – WLC 176.20, WLC 176.22, WLC 176.23, WLC 176.110

Badat 1927 NPD 435 WLC 176.39

De Wet v Worcester Municipality 1911 CPD 595 – WLC 176.58

Durban Corporation v Estate Whittaker 1919 AD 195 – WLC 176.39

Great Fish River Irrigation Board v Southey (1) 1927 Uys WLC 125 WC – WLC 176.49

Hall & Sons Ltd re Gladdespruit 1931 Uys WLC 159 WC – WLC 176.15, WLC 176.16, WLC 176.17, WLC 176.18, WLC 176.19, WLC 176.22, WLC 176.23, WLC 176.25, WLC 176.30, WLC 176.31, WLC 176.41, WLC 176.42, WLC 176.43, WLC 176.48, WLC 176.65, WLC 176.79, WLC 176.83, WLC 176.109

Jones v Conn LRA 3 1903 (USA) – WLC 176.64

Reid v Van der Merwe 1926 Uys WLC 122 T – WLC 176.105

Scheepers v Randfontein Estate & Gold Mining Co 1899 T (6 OR) 67 – WLC 176.50, WLC 176.51

Southey v Southey 1905 C (22 SC) 650 – WLC 176.69

Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 176.50, WLC 176.53, WLC 176.55

Wagenaar v Du Plessis (2) 1931 Uys WLC 155 A – WLC 176.49

CRAIES *Statute Law* ed 3 p 177 – WLC 176.39

D 8 3 17 – WLC 176.56

D 43 20 1 16 – WLC 176.57

DE VILLIERS *JER Water Law 10: Secondary Use of Normal Flow further considered*, in SALJ 1922 39 – WLC 176.83

FARNHAM *Water Rights* (ed 1904) 463(a), 602 – WLC 176.58, WLC 176.60, WLC 176.61, WLC 176.62, WLC 176.63, WLC 176.64

HALL *CG Water Law in SA* p 57 – WLC 176.50

MAXWELL *Interpretation of Statutes* ed 7 p 37 – WLC 176.39

Kruger re Elandspruit 1934 Uys WLC 177 WC

[WLC 177 NOTES]

Judgment Date 1934-03-29. **Court** WC (Pretoria). **Judge(s)** DE VILLIERS (Acting Water Court Judge).

Also reported as *Ex parte Kruger Watermeyer* 1.129

Quick-Note

Apportionment – land outside catchment area – in competition with properties within area

Summary

In an application for apportionment, held –

- (1) An owner of riparian land may bring into competition all his “irrigable land” whether it lies within the catchment area of the stream or outside it.
- (2) If the court finds that the use of the water on land outside the catchment area would be wasteful, uneconomical or unreasonable, it may exclude such land.
- (3) For estimating the “comparative extent of irrigable land” means that the irrigable land on each original grant must be limited to so much land as can be directly and beneficially irrigated from the stream if it had the sole use of the usual flow during the irrigating period of the year.
- (4) The fact that an upper owner has denied a lower owner the right to share in the water of a public stream thereby inducing the lower owner to apply to court for an apportionment, is not in itself sufficient reason to order the upper owner to pay all the costs of the apportionment.

Sources Noted

1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 177.18, WLC 177.21

1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 177.19, WLC 177.20, WLC 177.21, WLC 177.22, WLC 177.23

Coetser re Spekboom River 1933 Uys WLC 176 WC – WLC 177.09

Transvaal United Trust and Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 177.20, WLC 177.24

EHRLICH CO *Apportionment of the Normal Flow of a Public Stream – Section 12 of Act 8 of 1912: Determination of Reasonable Share for Secondary Use* – WLC 177.17

HALL CG *Water Rights in South Africa* 217 – WLC 177.21

Union Government v Moller 1934 Uys WLC 178 WC

[WLC 178 NOTES]

Judgment Date 1934-04-12. **Court** WC (Cape Town). **Judge(s)** EF WATERMEYER.

Also reported as *Ex parte Union Government v Moller & Others Watermeyer* 1.137

Quick-Note

Apportionment – land not used for irrigation – Reasonable use – provision for changed circumstances

Summary

Irrigable land was permanently being used for a purpose which does not require irrigation. The question was whether it should be included in an apportionment. Held –

- (1) To award water for it would sanction waste.
- (2) If the land may in future require water when it is used differently, the court will make an apportionment which is reasonable in the present circumstances, but with leave to apply for a variation when there is a change in the manner in which the property is used.

Sources Noted

1912 GN 982 r 9(i) (Principles to Guide Water Courts) – WLC 178.20

1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 178.20

1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 178.20

Pietpotgietersrust Municipality v Amm 1914 Uys WLC 24 WC – WLC 178.20

Lower Dwars River River Board 1934 Uys WLC 179 WC

[WLC 179 NOTES]

Judgment Date 1934-05-01. **Court** WC (Lydenburg). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte The Lower Dwarsriver River Board Watermeyer* 1.143

Quick-Note

Apportionment – river board has no power

Summary

A river board has no power to make an application for the apportionment of water in a public stream.

Sources Noted

1912 Act 8 s 32 – WLC 179.03

1912 Act 8 s 32(b) – WLC 179.01

1912 Act 8 s 61 – WLC 179.04

1912 Act 8 s 62 – WLC 179.02, WLC 179.04

***Stevenson re Visch Spruit* 1934 Uys WLC 180 WC**

[WLC 180 NOTES]

Judgment Date 1934-07-23. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte Stevenson* Watermeyer 1.144

Quick-Note

Irrigable land – suitability for growing irrigated crops – availability of water

Summary

In an application for apportionment the question was whether certain land was “irrigable land” as defined. Held, that it means land which from its inherent nature is fit for growing irrigated crops regardless of whether or not there is sufficient water available to irrigate it.

The principle of “stare decisis” discussed.

Sources Noted

1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 180.09, WLC 180.10, WLC 180.11

Faithful & Gray, R v 1907 TPD 1077 – WLC 180.08

Pretorius v Glas 1923 TPD 156 – WLC 180.08

Transvaal United Trust and Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 180.07, WLC 180.09, WLC 180.11, WLC 180.12

HALL *Water Rights in South Africa* 217 – WLC 180.10

***De Souza re Spekboom River* 1934 Uys WLC 181 WC**

[WLC 181 NOTES]

Judgment Date 1934-08-17. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte De Souza* Watermeyer 1.148

Quick-Note

Tributary – main stream – headwater

Summary

In an application for apportionment, the question arose whether the Spekboom River was a tributary of the Steelpoort River. Held –

- (1) The following factors are guides: comparative lengths of the rivers, extents of catchment areas, areas of land irrigable from each stream, direction of flow and angle of confluence, volume of water in each stream during the year and the permanence thereof in the dry season, comparative depths of channels and the character of the banks.
- (2) Permanence of flow in the dry season does not outweigh the other factors.

Sources Noted

1912 Act 8 s 10(4) – WLC 181.04, WLC 181.19

DE VILLIERS JER *Water Law 7: Tributaries*, in SALJ 1921 38 389 – WLC 181.04

***Van Heerden re Liefde-en-Vrede Spruit* 1935 Uys WLC 182 WC**

[WLC 182 NOTES]

Judgment Date 1935-02-16. **Court** WC (Johannesburg). **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Ex parte Van Heerden* Watermeyer 1.152

Quick-Note

Apportionment – protected works under previous law – irrigable land – *Pietersburg* principle

Summary

In an action for apportionment a riparian owner in the Transvaal claimed that he had works on his farm which had existed since before 1908 and which enabled him to employ usefully all the water of a public stream. He said that his works were protected and therefore he need not let any of the water flow down to lower owners. Held –

- (1) That owner has to prove that his predecessor in title was entitled to use all the water of the stream; because under the Transvaal Law of 1894 he would have been entitled to use only a proportionate share of the water for secondary purposes, that that principle had not been altered by the Transvaal Act of 1908, and that consequently he was not protected by. The Act of 1912.
- (2) The “comparative extent of irrigable land” on any one original grant cannot exceed the extent of irrigable land which it is possible to irrigate beneficially on that grant by direct irrigation without storage from the whole stream in question – the “Pietersburg principle” which was discussed and explained.

Sources Noted

1894 TRANSVAAL Law 11 s 10 (Irrigation) – WLC 182.08, WLC 182.09

1894 TRANSVAAL Law 11 s 12 (Irrigation) – WLC 182.08, WLC 182.09

1912 Act 8 s 2 “riparian land” – WLC 182.30

1912 Act 8 s 10 – WLC 182.47, WLC 182.56, WLC 182.59

1912 Act 8 s 10(1) – WLC 182.52

1912 Act 8 s 24(a) – WLC 182.05, WLC 182.06, WLC 182.09, WLC 182.10
 1912 Act 8 s 32(b) – WLC 182.01
 1912 Act 8 s 103 – WLC 182.51
 1912 GN 982 r 1-10 (Principles to Guide Water Courts) – WLC 182.27
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 182.42, WLC 182.52, WLC 182.67
 1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 182.28, WLC 182.33, WLC 182.49, WLC 182.50, WLC 182.61
 1912 GN 982 r 9(vii) (Principles to Guide Water Courts) – WLC 182.35
 1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 182.25, WLC 182.39, WLC 182.42, WLC 182.59
 1912 GN 982 r 68 (Principles to Guide Water Courts) – WLC 182.56
Allen v Tamsen 1932 Uys WLC 167 – WLC 182.41
Ball v Erasmus 1927 Uys WLC 130 WC – WLC 182.36
Jordaan v Winkelman 1879 C (9 B) 79 – WLC 182.52
Kruger re Elandspruit 1934 Uys WLC 177 WC – WLC 182.41, WLC 182.46
Rand Water Board re Vaal River 1916 Uys WLC 40 WC – WLC 182.56
Stevenson re Visch Spruit 1934 Uys WLC 180 WC – WLC 182.26, WLC 182.40, WLC 182.43, WLC 182.47, WLC 182.55
Taylor re Sabalele Stream 1932 Uys WLC 170 WC – WLC 182.41
Transvaal United Trust and Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 182.25, WLC 182.37
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 182.58
Venter v De Villiers 1916 Uys WLC 42 WC – WLC 182.20
 DE VILLIERS JER *Water Law 9: Secondary Use of Normal Flow*, in SALJ 1922 39 153 – WLC 182.52
 HALL CG *Water Rights in South Africa* 60 – WLC 182.09
 HALL CG *Water Rights in South Africa* 217 – WLC 182.42, WLC 182.43

***Joubert v Espach* 1935 Uys WLC 183 T**

[WLC 183 NOTES]

Judgment Date 1935-05-28. **Court** TPD. **Judge(s)** L GREENBERG, CL BOTHA

Also reported as *Joubert v Espach and Others* 1935 TPD 299

Quick-note

Apportionment – basis of irrigable land – reduction if other water sources available – proof – jurisdiction of water court to order erection of measuring weir and a furrow

Summary

In an apportionment suit between riparian owners the water court took an arbitrary area of 50 morgen as the basis of its apportionment to J's property. But J had 130 morgen under irrigation. The water court's decision was apparently based on the unproved allegation that J also had access to the water of another river.

The water court also ordered that measuring weirs should be erected at a certain point in a furrow and that J should pay the full costs because the purpose of the weir was to ensure that he took only one-sixth of the water at that point.

The water court further ordered J to construct a certain furrow by a specified date, failing which he would incur a penalty.

J appealed against the water court's judgment on these 3 points.

HELD: (1) That J was *prima facie* entitled to 130 morgen as the basis for an apportionment of water; if any other person contended that other factors had to be taken into account which would diminish that figure, such as that there was an additional source of supply, the onus would rest on the person who claimed the diminution to establish his contention.

(2) That the proper order for the appeal court to make was not to alter the basis of assessment from 50 morgen to 130 morgen, but to remit the matter to the water court to investigate the matter again on the proper basis.

(3) That the cost of erecting the measuring weir should be shared with by the lower riparian owners in proportion to the amount of water to which they were entitled, and the water court's order should be altered in this respect.

(4) That the water court had no jurisdiction to order the construction of a furrow, and that its order to that effect must be set aside.

Sources Noted

1912 Act 8 s 32(b) – WLC 183.01

Reid v Van der Merwe 1926 Uys WLC 122 T – WLC 183.13

***Taute v Allers* 1935 Uys WLC 184 WC**

[WLC 184 NOTES]

Judgment Date 1935-09-16. **Court** WC (Cape Town). **Judge(s)** AvdS CENTLIVRES.

Also reported as *Taute v Allers and Others* Watermeyer 1.165

Quick-Note

Prescriptive right to water – mere diversion is not necessarily adverse user

Summary

In an application for apportionment an upper owner claimed against a lower owner a prescriptive right to divert and use water from a stream. HELD –

(1) He must show that the effect of such diversion has been to deprive the lower owner of his reasonable share of the

water of that stream during the whole period of prescription.

- (2) The mere fact that the upper owner has diverted the whole normal flow of the stream does not of itself prove that the lower owner is not receiving his reasonable share, for in law it makes no difference how he receives it, whether by direct flow, runoff (*afloop*) or flush (*opslag*).

Sources Noted

1912 Act 8 s 32(b) – WLC 184.01

Du Toit v Potgieter 1898 C (8 CTR) 467 – WLC 184.13, WLC 184.14, WLC 184.17

Sundays River Irrigation Board v Parkes Bros (1) 1936 Uys WLC 185 WC

[WLC 185 NOTES]

Judgment Date 1936-01-10. **Court** WC (Cape Town). **Judge(s)** AvdS CENTLIVRES.

Also reported as *Sundays River Irrigation Board v Parkes Bros (1)* Watermeyer 1.172

Quick-Note

Protection order – becomes effective when delivered in court

Summary

In an application for an interdict against infringing a protection order previously made by a water court, it was argued that the judgment had not been re-registered and therefore had not become effective. Held –

- (1) Such a judgment need not be registered before it becomes effective.
- (2) An owner who acquires riparian property subsequent to the date of such a judgment is therefore bound by its terms even though he was ignorant of the judgment at the time he bought his property.
- (3) A judgment of the court becomes operative as soon as it is delivered in open court. Its validity is not affected by the fact that no order is subsequently issued by the registrar of the court.

Sources Noted

1912 Act 8 s 15 – WLC 185.02

1912 Act 8 s 16 – WLC 185.02, WLC 185.13, WLC 185.26

1912 Act 8 s 16(1) – WLC 185.06

1912 Act 8 s 16(2) – WLC 185.11, WLC 185.16, WLC 185.30

1912 Act 8 s 37(2) – WLC 185.40, WLC 185.44

1912 Act 8 s 41 – WLC 185.31, WLC 185.32, WLC 185.35

1912 Act 8 s 115 – WLC 185.34

1917 GN 459 r 21 (Water Court Rules) – WLC 185.51

1917 GN 459 r 22 (Water Court Rules) – WLC 185.51

1917 GN 459 r 23 (Water Court Rules) – WLC 185.51

1917 GN 459 r 24 (Water Court Rules) – WLC 185.51

1934 Act 46 s 19 Irrigation Amendment Act – WLC 185.09

Du Toit v Malherbe 1828-49 C (2M) 299 – WLC 185.28, WLC 185.29

Garlick Estate v Commissioner for Inland Revenue 1934 AD 499 – WLC 185.45

Halgreen v Theron 1927 EDL 417 – WLC 185.24

Mayor Aldermen and Citizens of the City of Wakefield v Cooke 1904 AC 31 – WLC 185.27

Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board 1924 Uys WLC 101 WC – WLC 185.06

Wagenaar v du Plessis (1) 1930 Uys WLC 155 A – WLC 185.31, WLC 185.36, WLC 185.38

DAMHOUDER Practijcke in Civile en Crimineele Saecken 219-220 – WLC 185.46

HALSBURY Laws of England (Hailsham ed) 13 460 – WLC 185.26

Somerset West Municipality & Cape Explosives Works Ltd 1936 Uys WLC 186 WC

[WLC 186 NOTES]

Judgment Date 1936-04-28. **Court** WC (Cape Town). **Judge(s)** AvdS CENTLIVRES.

Also reported as *Ex parte the Municipality of Somerset West and the Cape Explosives Works Ltd* Watermeyer 1.181

Quick-Note

Apportionment – sources of stream – main stream and tributaries – diversion right from weir by prescription and vetustas – riparian land – irrigable land – costs

Summary

Application was made for an apportionment of a stream flowing down from a mountainous area and within a few miles of its source was joined by three substantial feeder streams rising in contiguous catchment areas. Several questions were raised:

- (1) As to which of the four streams was the source of the river, HELD –
 - (1.1) a stream may have more than one source;
 - (1.2) factors to be considered in deciding which are tributaries and which is the main stream, are their relative length, volume, permanence of flow and the angle and place of confluence;
 - (1.3) the names of the streams is not material;
 - (1.4) the mere fact that a stream joins a river comparatively low down in its course is not of itself sufficient to indicate

- that it is not a source of the river;
- (1.5) a stream which is led by an artificial channel into a public stream does not become a public stream: but its water flowing into the public stream becomes public water.
- (2) As to the acquisition of a prescriptive right to water diverted from a certain weir, HELD –
- (2.1) if the quantity of the water taken varied considerably, no prescriptive right to use it had been proved;
- (2.2) if the weir had regularly been breached by others, it constitutes an interruption in the continuity or peaceability of the claimant's user;
- (2.3) even if the breaching took place without the claimant's approval;
- (2.4) if a riparian owner requests an upper owner to let down water, the presumption is that he makes it by virtue of his riparian right and not as a favour;
- (2.5) if it is claimed that that water rights were acquired by immemorial use (vetustas), it must be proved that the water was used contrary to others' rights.
- (3) As to whether certain land is riparian, HELD –
- (3.1) land is not riparian to a river simply because in times of extraordinary floods the river overflows its banks on to such land;
- (3.2) if water is led from a public stream by means of an artificial furrow across non-riparian land for 30 years, does not make that land riparian and therefore does not entitle it to share in the water of the public stream;
- (3.3) Land is not riparian to a public stream merely because it is riparian to a tributary of that stream and it is therefore not entitled to share in the water of the main stream.
- (4) As to what is "irrigable land", Held –
- (4.1) it does not include land suitable for irrigation in the abstract: the land should be beneficially irrigable without storage of the normal flow of the stream which the parties wish to divide;
- (4.2) the "comparative extent of irrigable land" may include areas covered by plantations of trees if it would be economically sound to clear the areas of trees and irrigate and cultivate them;
- (4.3) the "comparative extent of irrigable land" on each original grant must therefore be limited to so much land as can be irrigated with the usual flow of the stream during the dry period of the year.
- (5) As to costs, Held –
- (5.1) the general costs of the apportionment proceedings should be paid by all the parties in proportion to the quantity of water awarded them;
- (5.2) but if special issues are raised (such as what streams are the sources of the river, prescriptive claims, whether certain land is riparian or not) the court may order the unsuccessful parties on these issues to pay the costs relative to such issues.

Sources Noted

1906 CAPE Act 32 s 4 – WLC 186.22
 1908 TRANSVAAL Act 27 s 44 (Irrigation) – WLC 186.22
 1908 TRANSVAAL Act 27 s 45 (Irrigation) – WLC 186.22
 1912 Act 8 s 2 "public stream" – WLC 186.01
 1912 Act 8 s 2 "riparian land" – WLC 186.97, WLC 186.99
 1912 Act 8 s 8(1) – WLC 186.22
 1912 Act 8 s 9 – WLC 186.13, WLC 186.19, WLC 186.20, WLC 186.21
 1912 Act 8 s 10(1) – WLC 186.110, WLC 186.119
 1912 Act 8 s 10(4) – WLC 186.29, WLC 186.101, WLC 186.107, WLC 186.108
 1912 Act 8 s 12 – WLC 186.101
 1912 Act 8 s 20(3) – WLC 186.108
 1912 Act 8 s 32(b) – WLC 186.01
 1912 Act 8 s 45 – WLC 186.164
 1912 Act 8 s 48 – WLC 186.107
 1912 Act 8 s 61(1)(a) – WLC 186.18, WLC 186.23, WLC 186.27, WLC 186.22
 1912 GN 982 r 1 (Principles to Guide Water Courts) – WLC 186.109, WLC 186.118
 1912 GN 982 r 2 (Principles to Guide Water Courts) – WLC 186.121
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 186.119, WLC 186.124, WLC 186.128
 1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 186.111
 1912 GN 982 r 9(vii) (Principles to Guide Water Courts) – WLC 186.122
 1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 186.117, WLC 186.118
 1916 Act 26 s 2 (Irrigation Amendment) – WLC 186.01
 1917 GN 459 r 21 (Water Court Rules) – WLC 186.163
 1917 GN 459 r 22 (Water Court Rules) – WLC 186.163
 1917 GN 459 r 24 (Water Court Rules) – WLC 186.163
 1934 Act 46 s 4 (Irrigation Amendment) – WLC 186.108
Barrington v Colonial Government 1885-6 C (4 SC) 408 – WLC 186.88
Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 186.29
De Beer v van der Merwe 1923 Uys WLC 96 A – WLC 186.82
French Hoek Municipality v Hugo 1884-5 C (3 SC) 346 – WLC 186.78
Johannesburg Municipality v Cohen's Trustees 1909 T 811 – WLC 186.23
Jordaan v Winkelman 1879 C (9 B) 79 – WLC 186.119
Klein Berg River (I) 1918 Uys WLC 61 WC – WLC 186.63, WLC 186.66
Kohler v Baartman 1895 C (12 SC) 205 – WLC 186.75, WLC 186.79
Municipality of Frenchhoek v Hugo 1883-4 C (2 SC) 230 – WLC 186.75, WLC 186.78
Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 186.75, WLC 186.76, WLC 186.78, WLC 186.79

Smartt Syndicate Ltd v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 186.100, WLC 186.101
Struben v Cape Town District Waterworks Co 1891-2 C (9 SC) 68 – WLC 186.27
Union Government v Lovvemoore 1930 AD 13 – WLC 186.88
Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 186.26
DE VILLIERS JER *Water Law 1: The 8th Section [of Act 8 of 1912]*, in SALJ 1920 37 247 – WLC 186.19
DE VILLIERS JER *Water Law 7: Tributaries*, in SALJ 1921 38 389 – WLC 186.29, WLC 186.102
DE VILLIERS JER *Water Law 9: Secondary Use of Normal Flow*, in SALJ 1922 39 153 – WLC 186.119

***Somerset West Municipality re Lourens River* 1936 Uys WLC 187 WC**

[WLC 187 NOTES]

Judgment Date 1936-04-28. **Court** WC (Cape Town). **Judge(s)** AvdS CENTLIVRES.

Also reported as *Ex parte the Municipality of Somerset West* Watermeyer 1.216

Quick-Note

Servitudes of abutment and aqueduct – for primary use of town inhabitants – use by non-riparian owners

Summary

A municipality applied for servitudes of aqueduct and abutment to take water for primary purposes from a stream to lead water into the ordinary reticulation system of the town. The effect would be that some of the water would be used on non-riparian land. HELD –

The servitudes could only be granted when it the court was ensured that non-riparian owners would not use the water.

Case postponed sine die.

Sources Noted

1912 Act 8 Chapter 7 – WLC 187.05
1912 Act 8 s 11(2) – WLC 187.06
1912 Act 8 s 62(b) – WLC 187.04
1912 Act 8 s 75 – WLC 187.04
1912 Act 8 s 76(1)(c) – WLC 187.04
1912 Act 8 s 101 – WLC 187.01
1912 Act 8 s 102 – WLC 187.01, WLC 187.04, WLC 187.05, WLC 187.06
1912 Act 8 s 110(1) – WLC 187.07, WLC 187.14
1912 CAPE Ord 10 s 179(3) – WLC 187.16
1912 CAPE Ord 10 s 210 – WLC 187.01
1912 CAPE Ord 10 s 224 – WLC 187.16
1912 CAPE Ord 10 s 7 – WLC 187.03
1917 GN 872 r 21 (Water Court Rules) – WLC 187.18
1917 GN 872 r 22 (Water Court Rules) – WLC 187.18
1917 GN 872 r 24 (Water Court Rules) – WLC 187.18

***Bosman, R v* 1936 Uys WLC 188 C**

[WLC 188 NOTES]

Judgment Date 1936-05-01. **Court** CPD. **Judge(s)** PST JONES, AvdS CENTLIVRES

Also reported as *Rex v Bosman* 1936 CPD 284

Quick-note

Diverting water from a public stream out of turn – wrongfulness – proof of accused's knowledge of fact

Summary

A riparian owner was away when his employee diverted water from the stream at a time when it was not the owner's turn. The owner was charged under s 133(1)(b) of Act 8 of 1912 with (1) "interfering or altering the flow of a public stream" and (2) "taking more water than he was entitled to".

Held: The Crown must prove that the accused knew or must have known or had authorised such unlawful diversion.

Sources Noted

1912 Act 8 s 133(1)(b) – WLC 188.01, WLC 188.09, WLC 188.10

***Breede River (Robertson) Irrigation Board v Brink* 1936 Uys WLC 189 A**

[WLC 189 NOTES]

Judgment Date 1936-05-28. **Court** AD. **Judge(s)** JS CURLEWIS, FW BEYERS, JER de VILLIERS (Judges of Appeal)

Also reported as *Breede River (Robertson) Irrigation Board, Appellant v Brink, Respondent* 1936 AD 359

Quick-note

Irrigation board constructing canal – statutory powers – flood water causing damage – board only liable if construction negligent

Summary

An Irrigation Board constructed an irrigation canal with a “level crossing” over a dry river bed. The crossing interfered with the natural flow of the water in the river in times of extraordinary flood and a downstream owner claimed damages from the board. The CPD awarded damages.

On appeal to the AD held: that Act 8 of 1877 (Cape) authorised an interference with private rights; that the owner failed to prove that the board was negligent in constructing such a crossing; and that the damages award be reversed.

Sources Noted

1877 CAPE Act 8 Part 3 (Irrigation) – WLC 189.41

1877 CAPE Act 8 s 33 (Irrigation) – WLC 189.01, WLC 189.13, WLC 189.18, WLC 189.20

1877 CAPE Act 8 s 34 (Irrigation) – WLC 189.01, WLC 189.13, WLC 189.18, WLC 189.20, WLC 189.40, WLC 189.45, WLC 189.46

1877 CAPE Act 8 s 39 (Irrigation) – WLC 189.02, WLC 189.06

1906 CAPE Act 32 (Irrigation) – WLC 189.01, WLC 189.46

1910 Act 5 s 13 (Interpretation of Laws) – WLC 189.46

Halliwell v Johannesburg Municipal Council 1912 A 659 – WLC 189.13

Johannesburg Municipality v African Realty Trust 1927 AD 163 – WLC 189.14, WLC 189.19

Mayor of Freemantle v Annois 1902 AC 213 – WLC 189.19

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 189.13, WLC 189.22, WLC 189.37, WLC 189.49, WLC 189.50, WLC 189.51

***Union Government v Friedman* 1936 Uys WLC 190 WC**

[WLC 190 NOTES]

Judgment Date 1936-06-04. **Court** WC (Kimberley). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Union Government v Friedman* Watermeyer 1.220

Quick-Note

Expropriation – several farms of same owner – retention of land – valuation factors

Summary

The government expropriated a piece of land consisting of several farms of the same owner. Held that the owner is not entitled to retain 100 morgen of land in respect of each farm.

In determining the value of the expropriated land, factors to be taken into consideration are: its capacity for carrying stock, the water supply and its distribution, the rainfall, the fencing and the proximity of the farm to the railway and the main road.

Sources Noted

1910 Act 5 s 7 (Interpretation of Laws) – WLC 190.19

1912 Act 8 s 9(2)(b) – WLC 190.08

1912 Act 8 s 98 – WLC 190.01, WLC 190.15

1912 Act 8 s 98(1) – WLC 190.16

1912 Act 8 s 98(2) – WLC 190.03, WLC 190.10, WLC 190.11, WLC 190.17

1934 Act 46 s 9 (Irrigation Amendment) – WLC 190.01, WLC 190.15, WLC 190.17

1934 Proc 113 (Vaal River Development Scheme) – WLC 190.01

Borough of Pietermaritzburg v Natal Land & Colonization Co 13 AC 478 – WLC 190.14

De Kock v Resident Magistrate of Caledon 1896 C (13 SC) 386 – WLC 190.13

De Villiers v Cape Divisional Council 1875 C (5 B) 50 – WLC 190.13

***Louis Trichardt Town Council re Dorps River* 1937 Uys WLC 191 WC**

[WLC 191 NOTES]

Judgment Date 1937-02-05. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Ex parte Louis Trichardt Town Council* Watermeyer 2.1

Quick-Note

Apportionment for secondary use – primary use included.

Summary

If a share of the water of a public stream is apportioned to a riparian owner for secondary use, his requirements for primary purposes should be out of such share.

Sources Noted

1912 Act 8 s 11 – WLC 191.11

1912 Act 8 s 11(5) – WLC 191.09

1912 Act 8 s 12 – WLC 191.09

1912 GN 982 r 3 (Principles to Guide Water Courts) – WLC 191.11

1912 GN 982 r 5 (Principles to Guide Water Courts) – WLC 191.11

Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 191.15

Uys v Municipality of Heidelberg 1937 Uys WLC 192 C

[WLC 192 NOTES]

Judgment Date 1937-03-22. **Court** CPD. **Judge(s)** HS VAN ZYL (Judge President), PST JONES

Also reported as *Uys v Municipality of Heidelberg 1937 CPD 174*

Quick-note

Irrigation rates – land owner reclaiming from occupier – no cause of action against occupier disclosed

Summary

The municipality of Heidelberg issued summons against Uys, claiming an amount for “arrear irrigation rates paid by plaintiff to the Duivenhoksrivier Irrigation Board Heidelberg in respect of irrigation lots 27-30 situate in the municipality of Heidelberg of which lots plaintiff was at the time registered owner and defendant the occupier and which water was duly supplied to and used by defendant as per specified account below.”

A land owner is liable for irrigation rates under Act 8 of 1912 s 91.

Uys excepted that no cause of action was disclosed in the summons. The exception was allowed because no legal relationship between the parties was disclosed from which Uys’s obligation to the municipality could be deducted. It was no answer that the defendant could ask for further particulars.

Sources Noted

1912 Act 8 s 70 – WLC 192.07

1912 Act 8 s 70(3) – WLC 192.07

1912 Act 8 s 91 – WLC 192.05

1912 Act 8 s 93 – WLC 192.06

Du Plessis v Philipstown Municipality 1937 Uys WLC 193 C

[WLC 193 NOTES]

Judgment Date 1937-04-23. **Court** CPD. **Judge(s)** HS VAN ZYL (Judge President)

Also reported as *Du Plessis v Philipstown Municipality 1937 CPD 335*

Quick-note

River course diverted by agreement – lower owner to build and maintain a dam – situation changed – whether lower owner may abandon dam.

Summary

A river flowed through farm D. D agreed with the P municipality to divert the channel of the river on D so that it flowed through D to P. By agreement P constructed and maintained a weir on the boundary between D and P, so that the water dammed up on D.

Over the years the dam benefited D and other riparian owners by the deposit of fertile silt on the land, but caused erosion on P’s commonage. P claimed an order declaring it entitled to abandon the weir and to allow the river to take its original and natural course.

Held, on the facts: that such abandonment would result in considerable damage to the land above and below the wall and it would not be possible to restore the conditions which existed prior to the construction of the weir.

Held, on the law: that the court could not make a new contract for the parties and that while the original contract stood, the municipality had to adhere to the terms of that contract, one of which was to maintain the wall no matter how onerous the carrying out of that term had become.

On the argument that the agreement constituted a servitude in P’s favour and that P was entitled to abandon such a servitude, the court held that it was not a servitude, and it was therefore unnecessary to decide whether a servitude which placed a maintenance obligation on the servitude holder could be abandoned by him.

Sources Noted

1912 CAPE Ord 10 s 179 – WLC 193.02

HALSBURY Servitudes – WLC 193.23

Olivier v Meintjes (1) 1937 Uys WLC 194 WC

[WLC 194 NOTES]

Judgment Date 1937-04-29. **Court** WC (Graaff-Reinet). **Judge(s)** AvdS CENTLIVRES.

Also reported as *Olivier v Meintjes and Another Watermeyer 2.4*

Quick-Note

Protection order – works not constructed

Summary

O applied for a servitude of storage. It appeared that his predecessor in title had applied for protection of his storage dam in the river, stating that he proposed to raise the weir by 10 feet and that the court granted permission for him to do so but fixed a time limit of 10 years within which the work had to be completed, which limit was extended for a

further 2 years by statute, but no work was done during this extension period
O argued that, despite the expiry of the time limit, he was entitled to raise his dam wall by 6 feet because prior to the commencement of the protection proceedings there had been an existing work with crest level 6 feet higher than it now existed but that the crest level was reduced by 6 feet owing to a flood in 1916.
Held: The protection order merely gave O the right to impound surplus water in the dam as it then was;
Held: Whereas the construction continued piecemeal without any definite plan and with no intention of building the weir to any particular height, the work could not be said to have been “in the course of construction” when Act 8 of 1912 came into effect.
[The application for a servitude of storage was therefore refused and O’s appeal to the CPD was dismissed – see 1937 Uys WLC 196 C below]

Sources Noted

1912 Act 8 s 24 – WLC 194.26, WLC 194.27
1912 Act 8 s 45 – WLC 194.28
1917 GN 459 r 21 (Water Court Rules) – WLC 194.28
1917 GN 459 r 22 (Water Court Rules) – WLC 194.28
1917 GN 459 r 24 (Water Court Rules) – WLC 194.28
1934 Act 46 (Irrigation Amendment) – WLC 194.09
Sundays River Irrigation Board v Parkes Bros (1) 1933 Uys WLC 185 WC – WLC 194.14
Sundays River Irrigation Board v Van Ryneveld's Pass Irrigation Board 1924 Uys WLC 101 WC – WLC 194.04
Wagenaar v Du Plessis (1) 1930 Uys WLC 155 A – WLC 194.25
Walker, Estate v Estate Petersen 1933 AD 23 – WLC 194.11

***White v Union Government* 1937 Uys WLC 195 C**

[WLC 195 NOTES]

Judgment Date 1937-05-17. **Court** CPD. **Judge(s)** HS VAN ZYL (Judge President), PST JONES, GG SUTTON

Also reported as *White v Union Government* 1937 CPD 225

Quick-note

Appropriation [expropriation] of land for Government irrigation work – compensation – production capacity – farming profit discounted by owner’s efficiency – exclusion of part of land for owner’s use

Summary

A farmer refused to accept the government’s offer of compensation for the expropriation of his farms for a government irrigation work, nor for the number of morgen the government would allow him to retain under s 98(2) of Act 8 of 1912

Held that the profit made by the farmer out of the land was an element of importance in determining the value of the land, but the water court had rightly reduced the capital value of such profit by making allowance for the extent to which such profit was due to the excellence of appellant as a farmer;

That in the absence of any evidence of sales of land, the water court was entitled to arrive at a value for the land by considering the evidence of witnesses of practical farming, agricultural and land valuation experience.

Appeal dismissed with costs.

Sources Noted

Act 8 of 1912 s 98 – WLC 195.01, WLC 195.03, WLC 195.04
Act 8 of 1912 s 98(2) – WLC 195.24, WLC 195.25, WLC 195.26, WLC 195.27, WLC 195.28
Act 8 of 1912 s 98(3) – WLC 195.10, WLC 195.21
1934 Act 46 s 9 (Irrigation Amendment) – WLC 195.01

***Olivier v Meintjes (2)* 1937 Uys WLC 196 C**

[WLC 196 NOTES]

Judgment Date 1937-12-13. **Court** CPD. **Judge(s)** HS VAN ZYL (Judge President), RPB DAVIS, RRRB HOWES (Acting Judge)

Also reported as *Olivier v Meintjes and Another* Watermeyer 2.10

Quick-Note

Servitude of storage.– former protection order not complied with – applicant now barred from raising weir

Summary

O appealed against the water court judgment which refused to allow him to raise his weir and to grant him a servitude of storage for his dam because his predecessor had failed to comply with a conditional protection order in respect of the same dam – see *Olivier v Meintjes (1)* 1937 Uys WLC 194 WC above.

His appeal was dismissed on the grounds that he was now barred from raising the weir because his weir cannot be regarded as having been “in construction” when Act 8 of 1912 came into effect.

Sources Noted

1912 Act 8 s 14 – WLC 196.13, WLC 196.14, WLC 196.20, WLC 196.24

1912 Act 8 s 15 – WLC 196.12, WLC 196.13
1912 Act 8 s 16 – WLC 196.12
1912 Act 8 s 24 – WLC 196.06, WLC 196.21, WLC 196.23, WLC 196.24
1934 Act 46 – WLC 196.05
Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board 1924 Uys WLC 101 WC – WLC 196.01
Wagenaar v Du Plessis (1) 1930 Uys WLC 155 A – WLC 196.12

***Port Elizabeth Municipality re Kromme River* 1938 Uys WLC 197 WC**

[WLC 197 NOTES]

Judgment Date 1938-02-18. **Court** WC (Cape Town). **Judge(s)** PST JONES.

Also reported as *Ex parte Port Elizabeth Municipality* Watermeyer 2.15

Quick-Note

Water for municipality on non-riparian land outside catchment area – urgency – gaugings dispensed

Summary

Application to use water for municipality on non-riparian land outside catchment area.

Permission was granted under s 23 of Act 8 of 1912. But applications of this nature should not be made without there being evidence of accurate gaugings of the river flow and its tributaries.

Sources Noted

1897 CAPE Act 27 (Port Elizabeth Municipal) – WLC 197.01
1912 Act 8 s 23 – WLC 197.03, WLC 197.27
1912 Act 8 s 115 – WLC 197.29
1912 CAPE Ord 10 s 3(c) (Cape Municipal) – WLC 197.01
1912 CAPE Ord 10 s 210(1) (Cape Municipal) – WLC 197.02
1913 CAPE Ord 13 s 1 (Port Elizabeth Municipal) – WLC 197.01
1931 CAPE Ord 3 (Port Elizabeth Municipal Extension) – WLC 197.01

***Port Elizabeth Municipality v Potgieter* 1938 Uys WLC 198 WC**

[WLC 198 NOTES]

Judgment Date 1938-02-18. **Court** WC (Cape Town). **Judge(s)** PST JONES.

Also reported as *Port Elizabeth Municipality v Potgieter* Watermeyer 2.20

Quick-Note

Servitude – compensation

Summary

In an application for a servitude of aqueduct to convey the water to which a municipality was entitled over other property, held that the owner of the servient property is to receive compensation for any actual loss or inconvenience which he may suffer as a result of the exercise of the right of access or occupation before, during and after the construction of the work with which the servitude is connected.

Sources Noted

1912 Act 8 s 23 – WLC 198.01, WLC 198.03
1912 Act 8 s 102(2) – WLC 198.20
1912 Act 8 s 109 – WLC 198.04, WLC 198.09
1912 Act 8 s 110(1)(d) – WLC 198.08
1912 Act 8 s 110(4) – WLC 198.19, WLC 198.20
1913 Act 16 s 6 (Forest) – WLC 198.03

***Union Government re Modini Spruit* 1938 Uys WLC 199 WC**

[WLC 199 NOTES]

Judgment Date 1938-03-28. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte the Union Government* Watermeyer 2.25

Quick-Note

Appointment – irrigable land all suitable land – availability of water not considered

Summary

In an apportionment the court, in determining the comparative extents of irrigable land on each riparian farm, took into account all land which from its nature was suitable for growing irrigated crops.

The court refused to apply the “Pietersburg principle” of limiting the extents of irrigable land according to the quantity of water available for irrigation.

Sources Noted

1912 Act 8 s 10(1) – WLC 199.17
1912 Act 8 s 32(b) – WLC 199.01

1912 Act 8 s 32(g) – WLC 199.01
 1912 GN 982 r 1 (Principles to Guide Water Courts) – WLC 199.17, WLC 199.18
 1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 199.12
 1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 199.09, WLC 199.16
 1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 199.10, WLC 199.18
 1916 Act 26 s 2 (Irrigation Amendment) – WLC 199.01
Louis Trichardt Municipality v Antrobus 1936 WC (UR) – WLC 199.11
Louis Trichardt Town Council re Dorps River 1937 Uys WLC 191 WC – WLC 199.15
Somerset West Municipality & Cape Explosives Works Ltd 1936 Uys WLC 186 WC – WLC 199.15, WLC 199.18
Stevenson re Visch Spruit 1934 Uys WLC 180 WC – WLC 199.11
Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 199.07
Van Heerden re Liefde-en-Vrede Spruit 1935 Uys WLC 182 WC – WLC 199.15
 HALL CG and FAGAN HA *Water Rights in South Africa: Supplement* (1937) p 30 – WLC 199.15

***Sundays River Irrigation Board v Parkes Bros (2)* 1938 Uys WLC 200 A**

[WLC 200 NOTES]

Judgment Date 1938-04-21. **Court AD.** **Judge(s)** J STRATFORD (Chief Justice), JER DE VILLIERS, NJ DE WET, BA TINDALL, R FEETHAM (Judges of Appeal)

Also reported as *Sundays River Irrigation Board, Appellant v Parkes Bros, Respondents* 1938 AD 493

Quick-note

Riparian owner's right to build a second weir in river – abandonment of first weir due to unsuitability

Summary

In 1924 a riparian owner applied to a water court for a protection order for his weir. The weir was in disrepair (“outflanked”) but the court granted the order on condition that it be repaired within 10 years.

His successors in title (P) started building another weir upstream, but was interdicted by the irrigation board (S). The interdict was granted on the ground that P’s action contravened the 1924 order.

P now applied for permission to build a new weir upstream. His reasons were that the weir was repeatedly outflanked by the river and has not been in use since 1908; that it has always been the intention to repair the weir but owing to the unsuitable site it is necessary to reconstruct it at a more suitable site. The effect of a new weir will be that less water will be extracted from the river.

S opposed it on the ground that the 1935 water court had already forbidden the construction of a new weir and that the matter was therefore *res judicata*: the same dispute between the same parties could not be heard again.

P countered that the 1935 water court held that P had no rights to build a second weir but never decided whether the court had the power to confer on P the right to build another weir if it abandoned the present weir;

The court held against P. P appealed to the CPD which held that the matter was not *res judicata* and referred it back to the water court to enquire whether P had a right to build another weir as claimed. S appealed against the CPD judgment to the AD.

The AD agreed with the CPD that the matter was not *res judicata* because the 1935 water court did not decide whether the owners had a right to move the weir: it only decided that the 1924 order prevented it from deciding the matter.

However, P never abandoned its intention of repairing the weir, and did not lose its rights in respect of the weir by failing to repair it within the 10-year period.

In any case, riparian owners no longer have a right to apply for permission to build a weir and divert water, because s 16 of Act 8 of 1912 – which authorised such applications – was repealed by Act 46 of 1934.

The water court therefore had no power to grant the application and the provincial division should not have referred the matter back to the water court but should have dismissed the appeal.

Sources Noted

1912 Act 8 s 15 – WLC 200.63, WLC 200.64, WLC 200.67, WLC 200.68, WLC 200.69
 1912 Act 8 s 15(2) – WLC 200.66
 1912 Act 8 s 16 – WLC 200.50, WLC 200.63, WLC 200.64, WLC 200.67, WLC 200.68, WLC 200.69
 1912 Act 8 s 16(2) – WLC 200.24, WLC 200.51, WLC 200.52, WLC 200.54, WLC 200.55, WLC 200.56, WLC 200.66, WLC 200.73
 1912 Act 8 s 16(6) – WLC 200.24
 1912 Act 8 s 20 – WLC 200.58
 1912 Act 8 s 20(1) – WLC 200.58
 1912 Act 8 s 20(2) – WLC 200.58
 1912 Act 8 s 20(3) – WLC 200.59
 1912 Act 8 s 24(a) – WLC 200.47
 1934 Act 46 s 4 (Irrigation Amendment) – WLC 200.50, WLC 200.51, WLC 200.55, WLC 200.58, WLC 200.61
 1934 Act 46 s 19 (Irrigation Amendment) – WLC 200.62, WLC 200.66, WLC 200.67, WLC 200.74
Sundays River Irrigation Board v Van Rynevelds Pass Irrigation Board 1924 Uys WLC 101 WC – WLC 200.02

***Green v Jooste* 1939 Uys WLC 201 WC**

[WLC 201 NOTES]

Judgment Date 1939-04-19. **Court** WC (Cape Town). **Judge(s)** JER DE VILLIERS.

Also reported as *Green and Others v Jooste and Others* Watermeyer 2.33

Quick-Note

Apportionment – condition in grant of farm – lower owners affected

Summary

In an application for apportionment, it appeared that the 1841 grant of one of the farms involved contained the condition “that the water running through this land shall remain free as hitherto for the farms situated below.”

A public stream flowed over the land. No evidence was available as to what the words “free as hitherto” meant in 1841.

Held –

The condition did not confer upon lower owners more than their full rights as riparian owners.

Sources Noted

Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd 1932 AD 25 – WLC 201.35

Biggs v Pretorius 1914 Uys WLC 21 WC – WLC 201.25, WLC 201.27, WLC 201.33

Union Government (Minister of Railways) v Faux Ltd 1916 AD 105 – WLC 201.36

West Rand Main Reef v Brink 1929 Uys WLC 146 T – WLC 201.20, WLC 201.32

Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 201.21

***Theunissen Municipality re Vet River* 1940 Uys WLC 202 WC**

[WLC 202 NOTES]

Judgment Date 1940-10-04. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte Municipality of Theunissen* Watermeyer 2.38

Quick-Note

Servitude for purification plant – power of court

Summary

In an application for servitudes of aqueduct, storage and abutment the court has the power under to grant a servitude for the erection of a purification plant.

Sources Noted

1912 Act 8 s 2 “irrigation work” – WLC 202.18

1912 Act 8 s 103 – WLC 202.16

1912 Act 8 s 103(1) – WLC 202.18

1912 Act 8 s 104 – WLC 202.16, WLC 202.17

1912 Act 8 s 105 – WLC 202.16, WLC 202.17

***Gronum v Rabone* 1941 Uys WLC 203 WC**

[WLC 203 NOTES]

Judgment Date 1941-05-09. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Gronum and Another v Rabone and Others* Watermeyer 2.41

Quick-Note

Run-off water – lower owners’ right to use.

Summary

In apportioning the water of a public stream the water court ordered that the owners of portions of an upper riparian farm would let the water in the spruit flow down freely and undisturbed during the nights for the benefit of lower owners.

The portions of the upper farm each had a turn of waterleading during the day.

Applicants, who were owners of portions of a lower riparian farm, complained that some upper owners were using runoff water during the turns of owners of portions above them.

Held that they were entitled to do so.

Sources Noted

DE VILLIERS JER *Water law 10: Secondary use of normal flow further considered*, in SALJ 1922 39 276 – WLC 203.12

HALL CG and FAGAN HA *Water Rights in South Africa* 213 – WLC 203.12

***Barber v Scanlan Irrigation Board* 1941 Uys WLC 204 WC**

[WLC 204 NOTES]

Judgment Date 1941-08-08. **Court** WC (Cape Town). **Judge(s)** JE DE VILLIERS. (Water Court Judge)

Also reported as *Barber and Others v Scanlan Irrigation Board* Watermeyer 2.43

Quick-Note

Flood water – Seepage water

Summary

In interpreting the term “flood water” as used in a written agreement the question arose as to whether it included water

which seeped back into the river bed from lands irrigated on the banks.
Held, that the term “flood water” primarily denotes the run off of surface water, whereas seepage water differs essentially from flood water in that it percolates slowly through the soil and not over the surface of the soil, Consequently the term “flood water” as used in the agreement referred to the water of freshets and floods only and did not include the seepage flow.

Sources Noted

1912 Act 8 s 10(2) – WLC 204.58, WLC 204.59, WLC 204.60

1912 Act 8 s 89 – WLC 204.21

Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co 1932 AD 25 – WLC 204.102

Barnabas Plein & Co v Sol Jacobson & Son 1928 AD 25 – WLC 204.102

Hougham v Abrahamson Irrigation Board 1938 WC Case 230 Somerset East (UR) – WLC 204.39

Union Government (Minister of Railways & Harbours) v Faux Ltd 1916 AD 105 – WLC 204.102

AMERICAN SOCIETY OF CIVIL ENGINEERS *Transactions of the*, 1930 94 1251 – WLC 204.55

DE VILLIERS JER *Water law 4: Sections 8-10 [of Act 8 of 1912]: The normal flow*, in SALJ 1921 38 121 – WLC 204.58, WLC 204.60

***Union Government v Maile* 1942 Uys WLC 205 A**

[WLC 205 NOTES]

Judgment Date 1942-10-08. **Court** AD. **Judge(s)** NJ de WET (Chief Justice), EF WATERMEYER, BA TINDALL, AvdS CENTLIVRES, R FEETHAM (Judges of Appeal)

Also reported as *Union Government, Appellant v Maile, Respondent* 1943 AD 3

Quick-note

Expropriation of land for irrigation scheme – compensation awarded by water court – less than government originally tendered – higher court will not interfere if discretion was properly exercised – Act 8 of 1912 s 98.

Summary

The government appropriated land for an irrigation scheme, and a water court determined the amount of compensation to be paid by to the land owner. The government appealed to the AD on the ground that the award was excessive

Held: that an appeal was authorised by the Act, even if the government originally offered more than eventually awarded.

Held: that the proviso to s 98(3) gave a discretion to the water court to award additional compensation and if that court has applied its mind to the matter and given reasons which are not arbitrary for making the additional award, the court of appeal will not interfere.

But where the water court awarded an excessive sum as compensation under s 98(3)(a)(iv) for loss of rentals, the appeal court would reduce the amount.

The term “fair value of any necessary or useful improvements” considered.

Sources Noted

1912 Act 8 s 39 – WLC 205.04

1912 Act 8 s 98 – WLC 205.01, WLC 205.04, WLC 205.16

1912 Act 8 s 98(2) – WLC 205.08, WLC 205.16

1912 Act 8 s 98(3) – WLC 205.08, WLC 205.13, WLC 205.16, WLC 205.39

1912 Act 8 s 98(3)(a) – WLC 205.07, WLC 205.12, WLC 205.13, WLC 205.14, WLC 205.25, WLC 205.27

1934 Act 46 s 9 – WLC 205.01, WLC 205.04

1936 Act 18 s 13 (Native Trust and Land) – WLC 205.04

1937 Act 29 s 4 (Unbeneficial Occupation of Farms) – WLC 205.04

Durban Corporation v Lincoln 1940 AD 36 – WLC 205.18

Eldon, Earl of v North Eastern Railway Co 1899 80 LT 723 – WLC 205.23

Greer v McHarry 1938 WLD 182 – WLC 205.06

Lechoana v Cloete 1925 AD 536 – WLC 205.19

Odendaal v Du Plessis 1918 AD 470 – WLC 205.06

Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501 – WLC 205.17

Warren v Union Government 1916 TPD 695 – WLC 205.06

Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 205.21

D 50 16 79 – WLC 205.19, WLC 205.22

***Chalkley re White River* 1942 Uys WLC 206 WC**

[WLC 206 NOTES]

Judgment Date 1942-11-30. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Ex parte Chalkley* Watermeyer 2.62

Quick-Note

Apportionment Application – Respondents on active war service – effect of Moratorium Act, 29 of 1940

Summary

An application for the apportionment of the water of a public stream is a civil legal remedy within the meaning of s 5 of Act 1 of 1914 as revived by s 8 of Act 29 of 1940.

Where certain respondents were on active service with the South African Defence Forces the hearing of the application was consequently postponed.

Sources Noted

1906 CAPE Act 32 (Irrigation) – WLC 206.08
1909 BRITAIN c 9 s 103 (South Africa Act) – WLC 206.07
1912 Act 8 s 32(a) – WLC 206.09, WLC 206.10
1912 Act 8 s 32(b) – WLC 206.01
1912 Act 8 s 39(1) – WLC 206.10
1913 ZIMBABWE Ord 13 s 26 (Water) – WLC 206.08
1914 Act 1 (Special Session) s 5(5)(a) (Public Welfare and Moratorium) – WLC 206.02, WLC 206.04
1916 Act 26 s 2 (Irrigation Amendment) – WLC 206.01
1917 Act 37 s 3 (Public Welfare and Moratorium Amendment) – WLC 206.02
1920 ZIMBABWE Ord 8 (Water Ordinance 1913 Amendment) – WLC 206.08
1940 Act 29 s 8 (Defence Special Pensions and Moratorium) – WLC 206.02, WLC 206.04, WLC 206.16
Barrell v Fordree 1932 AC 676 – WLC 206.12
Bulawayo Municipality v Roberts 1927 Uys WLC 124 A – WLC 206.08
Chatenay v Brazilian Submarine Telegraph Co 1891 1 QB 79 – WLC 206.15
Collier v Redler 1923 AD 640 – WLC 206.11
Ferreira v Sapiero 1913 Uys WLC 15 A – WLC 206.08
Garlick v Smartt (1) 1927 Uys WLC 129 A – WLC 206.10
Gillingham v Transvaalsche Koelkamers Bpk 1908 T 964 – WLC 206.11
MAXWELL *Interpretation of Statutes* ed 8 p 3 – WLC 206.12
MAXWELL *Interpretation of Statutes* ed 8 p 2 – WLC 206.15

***De Villiers v Galloway* 1943 Uys WLC 207 A**

[WLC 207 NOTES]

Judgment Date 1943-05-04. **Court** AD. **Judge(s)** EF WATERMEYER (Acting Chief Justice), BA TINDALL, AvdS CENTLIVRES (Judges of Appeal)

Also reported as *De Villiers, Appellant v Galloway, Respondent* 1943 AD 439

Quick-note

Water percolating from upper to lower land – damage and interdict – source of percolating water – whether storage in upper owner's dam is interference with natural flow – lower land subject to natural servitude to accept water from upper land

Summary

Landowner V experienced wetness on his farm and he alleged that water percolated from a dam on the higher land of his neighbour (G); he said that G was negligent and acting unlawfully by concentrating the natural flow of water in the area, by not making his dam impervious, and by diverting water from another valley to his dam. V then claimed an interdict and damages.

The trial court found that V had not proved how much water came from the dam, how much from other sources, how much would naturally have reached the lower property, nor what damage (if any) the water from the dam caused. It therefore ordered absolution from the instance.

On appeal, application was made to amend the declaration by including a prayer to prohibit G from storing in his dam water from another catchment area. The application was refused because it was too late and would prejudice G and other owners in the area

On the law and the facts, held that a lower farm was subject to a natural servitude compelling it to receive such water as would in the ordinary course of nature have flowed on to it from G's farm; but it did not include water from another catchment area.

Held further that V failed to prove that water leaking from the dam was water which was diverted by G from its natural course and caused the damage.

Order of absolution accordingly confirmed.

Sources Noted

D 39 3 1 1 – WLC 207.22
VOET 39 3 2 – WLC 207.14

***Mynhardt v Union Government* 1943 Uys WLC 208 WC**

[WLC 208 NOTES]

Judgment Date 1943-08-23. **Court** WC (Cape Town). **Judge(s)** JE DE VILLIERS.

Also reported as *Mynhardt v Union Government* Watermeyer 2.65

Quick-Note

Expropriation – Compensation

Summary

The value of useful improvements on land expropriated under s 98 of Act No.8 of 1912, must be assessed as at the date

when the Notice of Expropriation becomes effective.

A person whose land has been expropriated is not entitled as of course to the additional 20% allowable under s 98(3)(a) and (b).

Sources Noted

1912 Act 8 s 98 – WLC 208.01

1912 Act 8 s 98(3) – WLC 208.07, WLC 208.08

1917 GN 459 r 21 (Rules of Court) – WLC 208.14

1917 GN 459 r 24 (Rules of Court) – WLC 208.14

1934 Act 46 s 9 (Irrigation Amendment) – WLC 208.01

***Van Tonder v Van Niekerk* 1943 Uys WLC 209 WC**

[WLC 209 NOTES]

Judgment Date 1943-10-01. **Court** WC (Cape Town). **Judge(s)** JE DE VILLIERS.

Also reported as *Van Tonder v Van Niekerk* Watermeyer 2.68

Quick-note

Dispute re use, diversion or appropriation of water – ambiguous order of court

Summary

An order of court was ambiguous, and the court had to decide which factors could be taken into account in interpreting such order. Held:

- (1) the principles in relation to the interpretation of ambiguous contracts are necessarily applicable to their full extent to the interpretation of an ambiguous order of court;
- (2) Extrinsic evidence is inadmissible to identify the parties and places referred to in the ambiguous order of court.
- (3) An inspection in loco may be held
- (4) The court may look at a plan referred to in the order, also at the pleadings, the reasons for judgment and the findings.

Sources Noted

Rand Water Board re Vaal River 1916 Uys WLC 40 WC – WLC 209.35

Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 209.25

SPENCER BOWER *Res Judicata* 173-4 – WLC 209.26

***Van der Lith v Alberts* 1943 Uys WLC 210 T**

[WLC 210 NOTES]

Judgment Date 1943-10-29. **Court** TPD. **Judge(s)** CE BARRY (Judge President), JM MURRAY, AC MALAN

Also reported as *Van der Lith v Alberts and Others* 1944 TPD 17

Quick-note

Riparian owners taking more water than allocated – damages, interdict and contempt of court – joinder of parties

Summary

In 1937 the water court apportioned the water of a public stream between the owners of riparian farms. Thereafter L alleged that A and others used more water than was their share in terms of the order.

A applied for an interdict against A and the others, for an order to commit them for contempt of court in terms of s 38, and for damages. The application was refused on the ground of misjoinder (ie that the application should not have been directed against certain owners).

On appeal, held that the parties had to be joined on the legal principle of “convenience” and also because the applicant asked not only for damages but also for an interdict which is in the nature of a declaration of rights and would affect all those joined. There was therefore no misjoinder and the appeal was allowed.

Sources Noted

1912 Act 8 s 38 – WLC 210.01

Cowan v Duke of Buccleuch 2 AC 344 – WLC 210.09, WLC 210.11, WLC 210.15

Morgan v Salisbury Municipality 1935 AD 167 – WLC 210.10

Muller's Executors v Small Farms Ltd 1910 TPD 189 – WLC 210.11, WLC 210.17, WLC 210.18

Van Aardt v Rothschild's Investments Ltd 1939 TPD 374 – WLC 210.17, WLC 210.18

Van der Vyver v Conradie 1914 Uys WLC 28 C – WLC 210.13, WLC 210.17, WLC 210.18

BECK *Principles of Pleading* – WLC 210.18

ENCLYCOPAEDIA OF SCOTS LAW 3 p 257 – WLC 210.09

***Hugo v Page* 1943 Uys WLC 211 C**

[WLC 211 NOTES]

Judgment Date 1943-11-26. **Court** CPD. **Judge(s)** PST JONES, JE de VILLIERS

Also reported as *Hugo v Page* 1944 CPD 119

Quick-note

Water unlawfully diverted onto property – owner’s emergency powers to re-divert

Summary

When heavy rain fell on P’s farm and an unusual volume of water poured onto his farm causing serious damage, he found that the flooding was due to furrows on the farm of his neighbour (H) which diverted the natural flow of water from a kloof above both farms. He regarded it as an emergency and went onto H’s farm and cut the walls of the furrows.

H sued P for damages, alleging that the cutting of the furrows resulted in H’s cultivated lands being flooded, rendering them unfit for cultivation until restored. P counterclaimed for the damage caused by the flooding on his farm due to the unlawful diversion of water by H through the furrows constructed by him. The magistrate decided in favour of P. H appealed.

The court upheld the magistrate’s judgment of absolution from the instance on H’s claim, and awarded P certain damages on his counterclaim.

Sources Noted

Greyvenstein v Hattingh 1906-9 A (3 BAC) 462 – WLC 211.17

Smith v Kenrick 1856 7 CB 515 – WLC 211.17

***Searles Ltd re Great Brak River* 1944 Uys WLC 212 WC**

[WLC 212 NOTES]

Judgment Date 1944-02-18. **Court** WC (Mossel Bay). **Judge(s)** JE DE VILLIERS.

Also reported as *Ex parte Searles Ltd* Watermeyer 2.76

Quick-Note

Tertiary use – use of normal flow and surplus water —Whether court can permit use of whole normal flow or all the surplus water. 1912 Act 8 s 20; 1934 Act 46 s 4

Summary

Application to grant permission to a riparian owner to abstract for tertiary use a stated quantity of surplus water or a defined part of the normal flow.

Water court may not grant at the expense of other riparian owners all the surplus water or the whole of the normal flow. There was no evidence as to which other riparian owners practised irrigation, or the extent of their holdings, or the extent to which they irrigated.

Held that the court could not in terms of s 20(2) determine what abatement should be made nor could it award compensation in terms of s 20(2)(d).

Permission to use the. whole normal flow and all the surplus water of the stream was accordingly refused.

Leave was however granted under s 20(3) to use for tertiary use a stated quantity of the normal flow and surplus water to which it was entitled for secondary use.

Sources Noted

1912 Act 8 s 20 – WLC 212.01, WLC 212.39

1912 Act 8 s 20(1) – WLC 212.23, WLC 212.28

1912 Act 8 s 20(2) – WLC 212.29, WLC 212.30, WLC 212.31, WLC 212.33

1912 Act 8 s 20(3) – WLC 212.13, WLC 212.38

1934 Act 46 s 4 – WLC 212.01, WLC 212.23

***Pretorius v Estate Lategan* 1944 Uys WLC 213 WC**

[WLC 213 NOTES]

Judgment Date 1944-02-25. **Court** WC (Cape Town). **Judge(s)** HA FAGAN.

Also reported as *Pretorius v Estate Lategan* Watermeyer 2.83

Quick-Note

Riparian land – Stream splitting up into two branches – both branches treated as one stream

Summary

Application for servitude of storage and aqueduct but Respondent on the ground that Applicant's farm was not riparian to the Brak River.

The Brak River split up into two branches, a north branch and a south branch, with low-lying vleiland between the two branches. Although a “public stream”, it flowed only after rain had fallen. In the absence of heavy rain the south branch of the river carried all the water, but after ordinary floods the water would spread out over the whole vleiland and would also flow in the north branch. Applicant's farm did not abut on the south branch of the river but on the north branch only.

Held, that the definition of “riparian land” in section 2 of Act 8 of 1912 must be read and applied in a practical manner, That in the circumstances both branches of the Brak River must be regarded as portions of the same river, despite the

fact that its water flowed principally in the south branch,
That Applicant's farm was accordingly ripariall to the Brak River and that she was consequently entitled to the servitudes applied for.

Sources Noted

1864 CAPE Act 19 (Crown Lands) – WLC 213.22, WLC 213.23
1870 CAPE Act 5 (Crown Lands Leasing Amendment) – WLC 213.22, WLC 213.23
1912 Act 8 Chapter 7 – WLC 213.01, WLC 213.52
1912 Act 8 s 2 “public stream” – WLC 213.33
1912 Act 8 s 2 “riparian land” – WLC 213.47
1912 Act 8 s 19 – WLC 213.53
1912 Act 8 s 19(1) – WLC 213.51
1912 Act 8 s 101 – WLC 213.54
1917 GN 459 r 21 (Water Court Rules) – WLC 213.60, WLC 213.61
1917 GN 459 r 22 (Water Court Rules) – WLC 213.60, WLC 213.61
1917 GN 459 r 23 (Water Court Rules) – WLC 213.60, WLC 213.61
Somerset West Municipality and Cape Explosives Works Ltd 1936 Uys WLC 186 WC – WLC 213.32
Van der Merwe v McGregor 1913 Uys WLC 13 C – WLC 213.45

***Fram v Minister of Lands and Irrigation* 1944 Uys WLC 214 WC**

[WLC 214 NOTES]

Judgment Date 1944-05-04. **Court** WC (Johannesburg). **Judge(s)** JGV VAN SOELEN (Water Court Judge).

Also reported as *Fram v Minister of Lands and Irrigation* Watermeyer 2.94

Quick-Note

Tertiary Use – public interest – No prejudice to other riparian owners – Powers of Irrigation Board

Summary

Application for permission to divert and use a fixed quantity of water from a public stream for the purpose of generating electric power. Applicant carried on farming on a very large scale, employed over 200 employees and the power was intended to be used in connection with his farming operations.

Held that it would be in the public interest to grant the application,

Held further that as there would be no prejudice to other riparian owners no compensation should be paid by applicant.

The powers of the Buffelspoort Irrigation Board established discussed.

Sources Noted

1912 Act 8 s 2 “natural stream” – WLC 214.32
1912 Act 8 s 11 – WLC 214.38
1912 Act 8 s 20 – WLC 214.01, WLC 214.15, WLC 214.32
1912 Act 8 s 20(2)(d) – WLC 214.20, WLC 214.23
1912 Act 8 s 91 – WLC 214.18
1912 Act 8 s 93 – WLC 214.18
1912 Act 8 s 126(2) – WLC 214.05
1912 GN 982 r 44-50 (Principles to Guide Water Courts) – WLC 214.38
1927 Proc 309 (Buffelspoort Irrigation board constituted) – WLC 214.28
1934 Act 37 (Buffelspoort Irrigation District Adjustment) – WLC 214.05, WLC 214.15, WLC 214.21, WLC 214.23, WLC 214.27, WLC 214.33
1934 Act 37 s 1 (Buffelspoort Irrigation District Adjustment) – WLC 214.28
1934 Act 37 s 2 (Buffelspoort Irrigation District Adjustment) – WLC 214.16
1934 Act 37 s 4 (Buffelspoort Irrigation District Adjustment) – WLC 214.16, WLC 214.28
1934 Act 37 s 5 (Buffelspoort Irrigation District Adjustment) – WLC 214.17
1934 Act 37 s 9 (Buffelspoort Irrigation District Adjustment) – WLC 214.18
MAXWELL *Interpretation of Statutes* ed 8 at p 109 – WLC 214.19

***Bloemfontein Municipality v Wedderburn* 1944 Uys WLC 215 WC**

[WLC 215 NOTES]

Judgment Date 1944-08-11. **Court** WC (Cape Town). **Judge(s)** HA FAGAN.

Also reported as *Bloemfontein Municipality v Wedderburn* Watermeyer 2.101

Quick-Note

Surplus water – application to store and divert – Effect of Moratorium Act

Summary

B Municipality had authority under OFS law to store and divert water from the Modder River. B now applied to the water court for permission to raise the dam wall a further 10 feet. The application was advertised as required under Act 8 of 1912.

W, one of the riparian owners, was on active service and objected to the hearing of the application claiming that the proceedings should be suspended by reason of the provisions of the Moratorium Act of 1914.

B then applied for leave to withdraw the application in so far as it was an application against W.

HELD: that W would not be adversely affected if the application were granted. Application to withdraw the main

application against W allowed; any order the court might make, not not be binding on W.

Sources Noted

1896 OFS Law 19 (Bloemfontein Water Works) – WLC 215.02, WLC 215.03
1912 Act 8 s 20(3) – WLC 215.03
1912 Act 8 s 23 – WLC 215.03
1914 Act 1 (Special Session) s 5 ((Public Welfare and Moratorium) – WLC 215.05, WLC 215.24
1917 GN 459 r 21 (Water Court Rules) – WLC 215.27
1917 GN 459 r 22 (Water Court Rules) – WLC 215.27
1917 GN 459 r 23 (Water Court Rules) – WLC 215.27
1917 GN 459 r 44 (Water Court Rules) – WLC 215.06
1917 GN 459 r 45 (Water Court Rules) – WLC 215.04, WLC 215.07, WLC 215.12, WLC 215.12
1917 GN 459 r 46 (Water Court Rules) – WLC 215.08, WLC 215.12
1934 Act 46 s 4 (Irrigation Amendment) – **WLC 215.03**
1935 OFS Ord 15 (Local Government Consolidation) – WLC 215.03
1940 Act 29 s 8 (Defence Special Pensions and Moratorium) – WLC 215.05

***Gorgens v Williams* 1945 Uys WLC 216 C**

[WLC 216 NOTES]

Judgment Date 1945-10-18. **Court** CPD. **Judge(s)** HA FAGAN

Also reported as *Gorgens v Williams* 1946 CPD 10

Quick-note

Lower owner blocking normal flow – obligation to accept water

Summary

W constructed a wall on his farm which impeded the natural flow of water and caused it to flow back on to the higher-lying farm of his neighbour (G).

G sued W for damages caused to G's crops by the flow of water thus impeded, and he also applied for an order to remove the wall.

Held that W was under a legal obligation to receive the water from G's farm and W was therefore ordered to remove the wall or so to open it that the water would not flow back to plaintiff's property, and to pay damages.

Sources Noted

De Villiers v Galloway 1943 Uys WLC 207 A – WLC 216.22, WLC 216.24
Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 – WLC 216.12
Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 216.11
Sadien v Vosper 1914 Uys WLC 18 WC – WLC 216.13
Steyn v Zeeman 1903 C (20 SC) 221 – WLC 216.11
Van der Merwe v Van Dyk 1900 C (17 SC) 538 – WLC 216.22

***Frasers Ltd v Wepener Municipality* 1946 Uys WLC 217 WC**

[WLC 217 NOTES]

Judgment Date 1946-02-19. **Court** WC (Bloemfontein). **Judge(s)** JE DE VILLIERS (Water Court Judge)

Quick-Note

Tertiary use of normal flow – public benefit – rights of lower riparian owners

Summary

F had been using the water of a public stream for 75 years to drive his mill, and now applied for more water to drive a larger turbine which replaced the old turbine.

Section s 20(1) power is given to the court to assist the development of industrial enterprises but not necessarily at the expense of agricultural operations. The court may, if satisfied that it is for the public benefit, grant an applicant tertiary use in respect of a specifically defined amount of water, whether normal flow or surplus water or a combination of both.

Held that the enterprise serves a public function and is of general benefit to the community. It is the only mill in this part of the Free State and it serves also Basutoland with which an extensive and mutually beneficial trade is carried on.

Held that primary and secondary rights of lower owners are not affected by this application and therefore the question of abatement does not arise.

Sources Noted

1912 Act 8 s 20 – WLC 217.10
1912 Act 8 s 20(1) – WLC 217.05, WLC 217.13
1912 Act 8 s 20(2) – WLC 217.06
1934 Act 46 s 4 – WLC 217.05, WLC 217.10

***Jooste v Van der Merwe* 1946 Uys WLC 218 WC**

[WLC 218 NOTES]

Judgment Date 1946-02-25. **Court** WC (De Aar). **Judge(s)** JE DE VILLIERS.

Also reported as *Jooste v Van der Merwe* Watermeyer 2.105

Quick-Note

Servitude – Plan – Costs

Summary

Application for servitudes of aqueduct and abutment.

When an Applicant applies to the Water court for the grant of a servitude a proper plan should be prepared showing the nature of the works proposed to be erected. This plan should be attached to the application so that the respondent may know what the Applicant requires of him.

As a general rule an Applicant who applies to court for a servitude should pay the general costs of the application. A respondent who opposes such an application is generally entitled to his costs to the extent to which he is successful in having conditions imposed protecting him in respect of the servitude.

Sources Noted

1912 Act 8 s 103 – WLC 218.02

1912 Act 8 s 105 – WLC 218.02

1912 Act 8 s 109 – WLC 218.02, WLC 218.03, WLC 218.07

1912 Act 8 s 110 – WLC 218.04, WLC 218.20

Holmes v Salzmann 1914 Uys WLC 27 WC – WLC 218.33

HALL & FAGAN *Water Law of SA* p 80 – WLC 218.27

***Van der Merwe v Fourie* 1946 Uys WLC 219 T**

[WLC 219 NOTES]

Judgment Date 1946-05-16. **Court** TPD. **Judge(s)** WH RAMSBOTTOM, ER ROPER, HJ CLAYDEN

Also reported as *Van der Merwe v Fourie* 1946 TPD 389

Quick-note

Stream dammed – Lower owner's crops damaged – interdict pending decision of water court – proof of "irreparable" future losses.

Summary

F dammed a stream which flowed over his land. His lower neighbour (M) alleged that it was a public stream and he applied for an interdict to restrain F from damming it until a water court determines the rights of the parties to the water. M also claimed damages on the grounds that, as a result of the damming by F, he was unable to irrigate his crops as usual and would suffer "irreparable loss" of future crops.

F denied that it was a public stream, and the court refused the interdict.

On appeal, held: assuming it was a public stream and that M had a *prima facie* right to its water, M did not need an interdict because he could claim damages for crops already lost; and in respect of future losses, M had to prove that they would be "irreparable". M failed to prove such losses and his appeal was therefore dismissed.

Sources Noted

1912 Act 8 s 2 "public stream" – WLC 219.04

Du Toit v Vorster 1928 TPD 385 – WLC 219.16

Prinsloo v Luipaardsvlei Estates 1933 WLD 6 – WLC 219.13, WLC 219.14

Setlogelo v Setlogelo 1914 AD 221 – WLC 219.04, WLC 219.12

Transvaal Property and Investment Co Ltd v SA Townships Mining and Finance Corp Ltd 1938 TPD 512 – WLC 219.11, WLC 219.12

Turkstra Ltd v Richards 1926 TPD 276 – WLC 219.16

***Clydesdale Transvaal Collieries Ltd v Witbank Municipality* 1946 Uys WLC 220 A**

[WLC 220 NOTES]

Judgment Date 1946-06-10. **Court** AD. **Judge(s)** EF WATERMEYER (Chief Justice), BA TINDALL, L GREENBERG, OD SCHREINER, R FEETHAM (Judges of Appeal)

Also reported as *Clydesdale (Transvaal) Collieries Ltd. and Others, Appellants v Witbank Municipality, Respondent* 1946 AD 694

Quick-note

Water court – permission to impound surplus water – upstream owners' future needs – surplus water for non-riparian use – reasonable share

Summary

The W municipality applied to a water court for permission to impound a public stream and to abstract for its use a stated quantity of the surplus water.

Six coal mining companies, upstream from the proposed dam, requested that the water court's grant was to be subject to a condition that their future water needs for tertiary purposes (ie mining) should not be prejudiced. Only one of them was in a position to submit details of their future needs. The water court refused the mines' request and their appeal to the TPD was dismissed.

On a further appeal, the AD held that a water court may grant permission to use surplus water on non-riparian land; may grant the municipality more than a reasonable share of the surplus water; and may refuse to reserve any rights of the mines if they were not yet able to prove their requirements.

The decision of the TPD confirmed.

Sources Noted

1910 Act 5 s 13(2)(b) (Interpretation of Laws) – WLC 220.42, WLC 220.44

1912 Act 8 s 20 – WLC 220.08, WLC 220.19, WLC 220.23, WLC 220.26, WLC 220.28, WLC 220.30, WLC 220.36, WLC 220.37, WLC 220.39, WLC 220.40, WLC 220.41, WLC 220.43, WLC 220.44, WLC 220.52, WLC 220.55, WLC 220.59

1912 Act 8 s 20(1) – WLC 220.27, WLC 220.31, WLC 220.39

1912 Act 8 s 20(2) – WLC 220.23, WLC 220.26, WLC 220.38, WLC 220.46, WLC 220.49, WLC 220.53

1912 Act 8 s 20(3) – WLC 220.30

1912 Act 8 s 20(4) – WLC 220.54

1912 Act 8 s 21 – WLC 220.37, WLC 220.38

1912 Act 8 s 23 – WLC 220.28, WLC 220.30

1912 Act 8 s 23(1) – WLC 220.29

1912 Act 8 s 45(1) – WLC 220.43

1912 Act 8 s 45(2) – WLC 220.43

1912 GN 982 r 23-31 (Principles to Guide Water Courts) – WLC 220.30

1912 GN 982 r 32 (Principles to Guide Water Courts) – WLC 220.35, WLC 220.40, WLC 220.42, WLC 220.44

1912 GN 982 r 34 (Principles to Guide Water Courts) – WLC 220.35, WLC 220.40, WLC 220.42, WLC 220.44

1912 GN 982 r 42 (Principles to Guide Water Courts) – WLC 220.35, WLC 220.36, WLC 220.40, WLC 220.42, WLC 220.44

1934 Act 46 s 4 – WLC 220.08, WLC 220.37

Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 220.38

***Hough v Steenkamp* 1946 Uys WLC 221 C**

[WLC 221 NOTES]

Judgment Date 1946-06-18. **Court** CPD. **Judge(s)** HA FAGAN

Also reported as *Hough v Steenkamp* 1946 CPD 446

Quick-note

Servitude to extract water from public stream on another's property –manner of extraction – dispute as to water rights – interdict

Summary

Riparian owner H applied to the supreme court for an interdict against lower owner S to prohibit S from building a weir in the river on H's property.

S countered that he had a servitude right to extract water from a pool in the river on H's farm and that he was in any case merely repairing the existing weir. He also argued that it was a "dispute as to water rights" concerning a public stream, and that the supreme court had no jurisdiction.

Held, that even if the court had jurisdiction, it could not grant the application because material facts did not appear from the affidavits and would require oral evidence. Nor was urgency proved – not even for a temporary interdict.

Water court's power to grant an interlocutory order (such as a temporary interdict) discussed but not decided.

Sources Noted

1906 CAPE Act 32 s 67(b) (Irrigation) – WLC 221.14

1906 CAPE Act 32 s 68 (Irrigation) – WLC 221.15, WLC 221.16

1912 Act 8 s 32(b) – WLC 221.14

1912 Act 8 s 32 bis(f) – WLC 221.20

1912 Act 8 s 34 – WLC 221.09, WLC 221.12, WLC 221.16, WLC 221.17

1916 Act 26 s 2 (Irrigation Amendment) – WLC 221.14

1917 GN 459 r 112 (Water Court Rules) – WLC 221.18

1944 Act 30 s 6 (Irrigation Amendment) – WLC 221.20

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 221.10, WLC 221.11

Du Plessis v Van Heerden 1912 Uys WLC 4 C – WLC 221.13, WLC 221.18

Woeke v Calitzdorp Irrigation Board 1924 Uys WLC 103 C – WLC 221.13, WLC 221.18

Worcester Municipality v Estate Joubert 1908 C (25 SC) 140 – WLC 221.13, WLC 221.15

Tweedegeluk Edms Bpk v Howes 1947 Uys WLC 222 T

[WLC 222 NOTES]

Judgment Date 1947-04-15. **Court** TPD. **Judge(s)** CE BARRY (Judge President), GJ MARITZ, ER ROPER

Also reported as *Tweedegeluk (Eiendoms) Beperk v Howes and Another* 1949 3 SA 1220 T

Quick-note

Right to water from servitude furrow – denial – is a dispute as to water rights – supreme court has no jurisdiction.

Summary

A water furrow from a public stream ran over property H to property T. But H diverted the water before it reached T. A servitude of aqueduct and maintenance in respect of the furrow was registered against the title deeds of the properties. T applied to the supreme court for an order to prevent H from withholding the water in the furrow.

H's reply was that the furrow was replaced by another furrow more than 30 years ago and that the servitude had in any case lapsed long ago due to merger. He therefore denied that T had any right to the water.

The court held that it had no jurisdiction because this was a "dispute or claim as to water rights" over which only a water court could decide under s 34.

On appeal, held: the effect of the applicant's claim was to bring the question of water rights into issue and that the court a quo had been correct in holding that it had no jurisdiction.

Sources Noted

1912 Act 8 s 34 – WLC 222.04, WLC 222.05

Calitz v Lyle 1928 Uys WLC 136 C – WLC 222.08

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 222.05

De Wet v Vermeulen 1926 Uys WLC 113 C – WLC 222.06

Edmonds v Smith 1947 Uys WLC 223 Z

[WLC 223 NOTES]

Judgment Date 1947-05-20. **Court** High Court Southern Rhodesia (Salisbury). **Judge(s)** RC TREDGOLD, WE THOMAS

Also reported as *Edmonds v Smith* 1947 2 SA 895 SR

Quick-note

Water court may allocate water from a public stream to a non-riparian hotel – domestic purposes

Summary

An hotel (S) needed water for domestic use and applied to a water court for the right to abstract water from a public stream (to which it was not riparian) and lead it over the riparian land of E. The court granted it 10000 gallons per day and a right of aqueduct over E's land. .

E appealed and argued that the Act did not entitle S to any water. Held: that the terms of s 117 of the (Southern Rhodesian) Water Act – in terms of which the water court granted the application of S – are very wide and intend to cover every possible case in which a human being or a human enterprise requires the use of water and for which there is no provision elsewhere in the Act.

If the use of water in an hotel is not strictly a primary use (as was argued) it is certainly not a secondary or tertiary use. Therefore it is a *sui generis* use for which no provision is made elsewhere in the Act, and a water court may grant water to it even if it is not riparian to a public stream.

The court also agreed with the quantity and compensation awarded by the water court and dismissed the appeal.

Sources Noted

1927 ZIM Water Act – WLC 223.08

1938 ZIM Water Act Amendment – WLC 223.08, WLC 223.09

1939 ZIM Chap 251 s 52 (Water Act) – WLC 223.04

1939 ZIM Chap 251 s 102(3) (Water Act) – WLC 223.22

1939 ZIM Chap 251 s 117 (Water Act) – WLC 223.06, WLC 223.09, WLC 223.13, WLC 223.18

Mount Cazalet Hotel 1930 ZIM WC (UR) – WLC 223.08

Transvaal Consolidated Land & Exploration Co Ltd v Escom 1947 Uys WLC 224 WC

[WLC 224 NOTES]

Judgment Date 1947-10-03. **Court** WC (Middelburg Transvaal). **Case No** 363. **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Transvaal Consolidated Land and Exploration Company Ltd v Escom and Others* Vos 33

Quick-note

Permission to construct dam in river – rights of riparian owners on tributary

Summary

A water court allowed P to construct a dam in a tributary of the Groot Olifants river on condition that in dry conditions it should allow water to flow down to the Escom dam in the Groot Olifants river. The condition was included in the order of court by agreement between and at the request of the parties.

Two years later T applied to the water court for permission to make a dam in the river above the point where the tributary joins it, the water to be used for all purposes.

P objected, because the proposed dam would cause less water to flow down the river to the Escom dam, with the result that P would be obliged to let out more water from its dam to replenish the Escom dam. P therefore demanded that T's proposed dam be subject to the condition that T be allowed to use water for tertiary purposes only if Escom's dam had sufficient water.

The court rejected T's argument that the tributary and the river were not the same stream and that the court need therefore not take into account the rights of other persons to the water of "such stream" as provided by s 20(2): a river and its tributaries were regarded as one for the purposes of this section.

But the court accepted T's argument that the decision of one water court does not bind another water court, and that the present court was therefore not obliged to impose the previous water court's condition about P having to let water flow down to Escom's dam. It could however award compensation to P and impose its own conditions.

The court therefore granted the requested permission for T's dam but subject to T letting water through to Escom's dam, and limiting T's use of the water for tertiary purposes.

Sources Noted

1908 TRANSVAAL Act 27 (Irrigation) – WLC 224.11
1912 Act 8 s 10(4) – WLC 224.13, WLC 224.14
1912 Act 8 s 12 – WLC 224.14
1912 Act 8 s 14 – WLC 224.15
1912 Act 8 s 20 – WLC 224.01, WLC 224.11
1912 Act 8 s 20(1) – WLC 224.10
1912 Act 8 s 20(2) – WLC 224.10, WLC 224.21, WLC 224.23, WLC 224.24
1934 Act 46 s 4 – WLC 224.01
Brouwer v De Wit 1908 C (25 SC) 801 – WLC 224.12
Nel v Potgieter 1880-4 A (1 BAC) 22 – WLC 224.12
Smartt Syndicate v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 224.12
HALSBURY *Laws of England* 13 (ed Hailsham) 460 – WLC 224.19

***Van den Berg v Karagornas* 1947 Uys WLC 225 WC**

[WLC 225 NOTES]

Judgment Date 1947-12-20. **Court** WC (Vryheid). **Case** 366. **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Van den Berg v Karagornas* Vos 37

Quick-note

Servitude of aqueduct – application to water court – objections

Summary

H (a riparian owner on the Ingonyama river) granted to B the right to take water from the river on H's land. The water would have to be led over the land of K but K refused to agree to a servitude of aqueduct over his property. B therefore applied to the water court (under Chap 6(b) of Act 8 of 1912) to award the servitude.

K opposed on the following grounds allowed by s 110(1)(e), namely –

- (1) That B could attain the object better by pumping water from B's own land. Held, on the facts: the aqueduct scheme was better, less expensive, and would bring twice as much good ground under cultivation.
- (2) That B had already attained the object by an agreement with another neighbour to use (and was using) water from another stream. Held: that B was not riparian to that stream and could not rely on that water.
- (3) That the works were not of sufficient utility in that the servitude was required to serve only 10 acres. Held: that the scheme was economic and would bring 20 acres of good soil under cultivation.
- (4) That the damage likely to be caused would be greater than the benefits because the proposed furrow will pass through B's cultivated land and plantations and will divide his farm into two uneconomical entities; that it will increase the risk of erosion; and the benefits to B will be of less value than the damage to K. Held: that B offered to build bridges over the furrow and that there would be no erosion danger.

The court therefore awarded the right of aqueduct and determined the compensation to be paid under s 110(2)-(4).

Sources Noted

1912 Act 8 s 109 – WLC 225.18
1912 Act 8 s 108 – WLC 225.18
1912 Act 8 s 110(4) – WLC 225.19

***Johnsen, R v* 1948 Uys WLC 226 N**

[WLC 226 NOTES]

Judgment Date 1948-02-16. **Court** NPD. **Judge(s)** AAR HATHORN (Judge President), FN BROOME

Also reported as *Rex v Johnsen* 1948 2 SA 203 NPD

Quick-note

Taking water from municipal furrow – contravention of bylaws – not a dispute as to water rights – magistrate's court has jurisdiction in criminal proceedings

Summary

J was charged before the magistrate with contravening Weenen municipal bylaws in that he drew water from a certain furrow other than by an authorised off-take, and at other than an authorised time.

The magistrate held that only a water court had jurisdiction in a “dispute as to water rights” (according to s 34(1) of the Water Act 1912) and acquitted the accused. The attorney-general appealed.

Held: This was no dispute about water rights. Section 34 in any case applied only to civil disputes. The acquittal was set aside and the matter referred back to the magistrate.

Sources Noted

1912 Act 8 s 34(1) – WLC 226.03, WLC 226.04, WLC 226.07

1944 Act 32 s 104(1) (Magistrates' Courts) – WLC 226.01

1944 Act 32 s 104(2) (Magistrates' Courts) – WLC 226.01

***Laubscher, R v* 1948 Uys WLC 227 C**

[WLC 227 NOTES]

Judgment Date 1948-03-24. **Court** CPD. **Judge(s)** JE DE VILLIERS (Acting Judge President), J HERBSTEIN

Also reported as *Rex v Laubscher* 1948 2 SA 793 CPD

Quick-note

Theft of water – no proof of ownership or type of water – irrigation water unlawfully taken – procedure to be used.

Summary

L was charged with theft in that he stole a quantity of “leading water” in the ownership or in the lawful possession of one G. The magistrate found him guilty.

On appeal, held: that it was not proved what type of water it was: if it was public water, it could not be stolen; if it was private water, the ownership was not proved; if it was water used for irrigation, the procedure of s 133 of Act 8 of 1912 should have been followed. Appeal upheld.

Sources Noted

1912 Act 8 s 133 – WLC 227.03

***Minister of Irrigation re Vlekpoort River* 1948 Uys WLC 228 C**

[WLC 228 NOTES]

Judgment Date 1948-04-01. **Court** CPD. **Judge(s)** J HERBSTEIN

Also reported as *Ex parte Minister of Irrigation* 1948 2 SA 779 CPD

Quick-note

Irrigation board works – board becomes owner of works and land on which erected – government succeeds board as owner of works and land and servitudes.

Summary

An irrigation board erected certain storage and diversion works on a portion of farm B. In 1916 the board entered into a notarial agreement with the owner of the farm to acquire servitudes of abutment and storage on the land on which the works were erected, and servitudes of aqueduct over and the removal of material from the remainder of the farm. The land on which the works stood was formally transferred to the board in 1917.

The board was disestablished in 1941 without a proper winding-up in terms of s 82. The government now petitioned the court for a declaratory order that the property of the board, including the works and the land on which they stood, and the servitudes, vested in the government.

Held: That the land of the board and the works thereon had become *bona vacantia* and by law vested in the government;

Held: That the board's purported acquisition in 1916 of servitudes of abutment and storage on the land on which the works were erected, was a nullity because by s 17 the land automatically became the ownership of the board when it erected the works thereon before 1916: the board could therefore not acquire servitudes of abutment and storage on its own property and the registration in 1917 of the land in the board's name was a mere formality since the ownership had already vested in the board.

Held: That the servitudes of aqueduct over and removal of materials from the remainder of the farm were valid, and were therefore board property which now vested in the government.

Sources Noted

1912 Act 8 s 17 – WLC 228.06, WLC 228.07
1912 Act 8 s 81 – WLC 228.01
1912 Act 8 s 82 – WLC 228.14
1912 Act 8 s 82(2) – WLC 228.14
1912 Act 8 s 83 – WLC 228.01
1912 Act 8 s 84 – WLC 228.01
1917 Act 28 s 2 – WLC 228.07
1941 Proc 100 (Maraisburg Irrigation Board Disestablishment) – WLC 228.14
Government [of the Union of SA] 1914 TPD 596 – WLC 228.18
Johannesburg Municipality v Transvaal Cold Storage 1904 TS 722 – WLC 228.22
SA Railways and Harbours v Paarl Roller Flour Mills Ltd 1921 CPD 62 – WLC 228.22
Sprawson (In re Hebron Diamond Mining Syndicate) 1914 TPD 458 – WLC 228.17
Union Government v Bolam 1927 Uys WLC 126 A – WLC 228.07, WLC 228.09, WLC 228.12
Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 228.23
HALL & KELLAWAY *Servitudes* p 18 – WLC 228.21
LEE *Introduction to Roman-Dutch Law* ed 4 p 167 – WLC 228.24
MAASDORP *Institutes of SA Law 2: Law of Property* p 169 – WLC 228.24
VOET 8 1 1 – WLC 228.24
VOET 8 4 15 – WLC 228.24

Van Zyl, R v 1948 Uys WLC 229 T

[WLC 229 NOTES]

Judgment Date 1948-08-16. **Court** TPD. **Judge(s)** HHW de VILLIERS, Q de WET

Also reported as *Rex v Van Zyl* 1948 4 SA 769 T

Quick-note

Person taking water from public stream – charged under section containing several offences – specific offence to be stated – using criminal procedure to settle water rights disapproved

Summary

Z was charged with contravening s 133(1)(b) and found guilty by the magistrate for taking water from a public stream and causing unspecified damage to another riparian owner. On appeal:

Held that the accused was found guilty of an offence with which he was not charged, because (a) the section contains several offences but the one of which he was found guilty was not one of them; and (b) if the intention was to charge him with one of those offences, namely of taking more water than he was entitled to, it had to be specified as such.

Held, that the criminal procedure should not be used for essentially civil disputes about water rights. The court's displeasure was shown by not referring the case back to the magistrate but by setting aside the conviction and sentence.

Sources Noted

1912 Act 8 s 133(1)(b) – WLC 229.02, WLC 229.11
Schech, R v 1927 TPD 839 – WLC 229.07

Uys v Hoffman 1948 Uys WLC 230 C

[WLC 230 NOTES]

Judgment Date 1948-11-11. **Court** CPD. **Judge(s)** FS&L SEARLE

Also reported as *Uys v Hoffman* 1949 1 SA 157 C

Quick-note

Infringement of apportionment agreement – urgent temporary interdict – supreme court has jurisdiction

Summary

Three riparian owners agreed on how the water from the stream is to be apportioned between them. When one of them sold his farm, the purchaser (H) was informed of the agreement but he did not acknowledge its validity and pumped at will.

One of the other owners (U) applied for an interdict against H pending application to a water court for the formal apportionment of the water. H objected to the jurisdiction of the supreme court.

Held: Whereas no water court had as yet been constituted which could hear such an application and whereas continued pumping would cause irreparable harm to U, the supreme court was entitled to issue an interlocutory order (which included a temporary interdict) under s 32bis.

Sources Noted

1912 Act 8 s 27 – WLC 230.12
1912 Act 8 s 29 – WLC 230.12
1912 Act 8 s 30 – WLC 230.12
1912 Act 8 s 32 bis – WLC 230.11
1912 Act 8 s 32 bis(f) – WLC 230.07
1912 Act 8 s 34 – WLC 230.07

1944 Act 30 s 6 – WLC 230.07, WLC 230.10
Hough v Steenkamp 1946 Uys WLC 221 C – WLC 230.08
Woelke v Calitzdorp Irrigation Board 1924 Uys WLC 103 C – WLC 230.09
Webster v Mitchell 1948 1 SA 1186 – WLC 230.15
HALL & FAGAN *Water Rights in South Africa* p 107 – WLC 230.09

***Struben v Certain Riparian Owners (1)* 1948 Uys WLC 231 WC**

[WLC 231 NOTES]

Judgment Date 1948-11-22. **Court** Northern WC (Pretoria), **Case** 397. **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Struben v Certain Riparian Owners* 1948 Vos 42

Quick-note

Apportionment of section of river – determination of source – relative flow and size of channel of each stream in upper basin to be taken into account

Summary

A riparian owner (S) applied to a water court to investigate all the streams constituting the upper basin of the river and to determine and apportion the water rights of the riparian owners. Other owners were joined as respondents.

The court found it necessary first to determine which of the many streams in the upper basin of the river was its source.

It held that the volumes of flow and relative sizes of the channels were the deciding factors, and decided that a particular stream was to be regarded as the source.

The apportionment question was investigated the following year, and is reported below in *Struben v Certain Riparian Owners* [2] 1949 Uys WLC 130 WC.

Sources Noted

1912 Act 8 s 2 “public stream” – WLC 231.04
1912 Act 8 s 32(b) – WLC 231.01
1916 Act 26 s 2 (Irrigation Amendment) – WLC 231.01

***MacGregor v Beckenstrater (1)* 1948 Uys WLC 232 T**

[WLC 232 NOTES]

Judgment Date 1948-12-10. **Court** TPD. **Judge(s)** JM MURRAY

Also reported as *Macgregor and Others v Beckenstrater* 1949 2 SA 137 T

Quick-note

Dispute about water distribution method – water court order not specific – is a dispute as to water rights – supreme court has no jurisdiction – water court president may issue interdict – even before water court constituted

Summary

Riparian owners made application to the supreme court for a temporary interdict against B on the ground that B was contravening the terms of a water apportionment previously made by a water court. B had several objections:

- (1) That s 33 prohibits a matter pending before a water court to be made the subject before another court. Held: it was not proved that a water court had been established to hear the matter. Objection dismissed.
- (2) That s 34 gave exclusive jurisdiction to a water court to hear any dispute or claim as to water rights. Held: this was such a claim or dispute because the previous apportionment did not specify the method of distribution, which led to the present dispute; before the court can grant a temporary interdict, it will have to go into the merits of the dispute, which s 34 prohibits it from doing.
- (3) That an itinerant water court president may issue an interlocutory order even before the water court has formally been constituted.

Objections (2) and (3) upheld: the supreme court therefore has no jurisdiction if a water court can handle the matter.

Sources Noted

1912 Act 8 s 27 – WLC 232.08, WLC 232.33, WLC 232.39
1912 Act 8 s 27(2) – WLC 232.34
1912 Act 8 s 27(3) – WLC 232.35
1912 Act 8 s 28 – WLC 232.08, WLC 232.33, WLC 232.36, WLC 232.45
1912 Act 8 s 28(1) – WLC 232.39
1912 Act 8 s 29 – WLC 232.33, WLC 232.37
1912 Act 8 s 32 bis – WLC 232.13, WLC 232.24, WLC 232.25, WLC 232.38, WLC 232.41, WLC 232.44
1912 Act 8 s 32bis(a) – WLC 232.25
1912 Act 8 s 32bis(d) – WLC 232.25
1912 Act 8 s 32bis(e) – WLC 232.26
1912 Act 8 s 32 bis(f) – WLC 232.28
1912 Act 8 s 33 – WLC 232.05, WLC 232.09, WLC 232.11
1912 Act 8 s 34 – WLC 232.05, WLC 232.12, WLC 232.20, WLC 232.22, WLC 232.31, WLC 232.46
1912 Act 8 s 43 – WLC 232.31
1917 GN 459 r 112 (Water Court Rules) – WLC 232.24 WLC 232.44

1924 Act 2 (Water Court Judge) – WLC 232.42, WLC 232.43
1944 Act 30 s 6 – WLC 232.13
1944 Act 30 s 6 (Irrigation Amendment) – WLC 232.24
1945 GN 872 r 6 (Water Court Rules) – WLC 232.27
De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 232.20
Du Plessis v Van Heerden 1912 Uys WLC 4 C – WLC 232.22
Hough v Steenkamp 1946 Uys WLC 221 C – WLC 232.21, WLC 232.29, WLC 232.32
Pretorius v Pretorius 1926 Uys WLC 123 T – WLC 232.22
Woeke v Calitzdorp Irrigation Board 1924 Uys WLC 103 C – WLC 232.22, WLC 232.23

***La Plaisante Fruit Farms v Imperial Cold Storage* 1949 Uys WLC 233 WC**

[WLC 233 NOTES]

Judgment Date 1949. **Court** WC (Cape). **Case** 288/1948. **Judge(s)** JE de VILLIERS

Also reported as *La Plaisante Fruit Farms v Imperial Cold Storage and Others* Vos 76

Quick-note

Water Court – Leave to intervene – onus to begin

Summary

An order was made by the water court in respect of certain parties' rights to the water of a very old furrow. Twenty years later the same parties applied to a water court to interpret the order. ICS, who was not a party to the original order, now applied to intervene.

The right to intervene was granted and the court decided that the onus to begin was on ICS.

Sources Noted

1912 Act 8 s 43 – WLC 233.15, WLC 233.19
1945 GN 872 r 30 (Water Court Rules) – WLC 233.14
1945 GN 872 r 31 (Water Court Rules) – WLC 233.14
1945 GN 872 r 31(4) (Water Court Rules) – WLC 233.19, WLC 233.20
1945 GN 872 r 32 (Water Court Rules) – WLC 233.14
1944 Act 32 r 57 (Magistrates Courts) – WLC 233.18

***Colyn v De Wet* 1949 Uys WLC 234 WC**

[WLC 234 NOTES]

Judgment Date 1949-01-24. **Court** WC (Cape Town). **Case** 293/1948. **Judge(s)** JE de VILLIERS

Also reported as *Colyn v De Wet en Andere* Vos 47

Quick-note

Right to divert water from river – prescription – volumes diverted throughout 30-year period to be proved – other factors to be proved

Summary

Riparian owners applied to a water court to apportion the water of a river. A group of upper owners (respondents) objected that by prescription they had acquired the right to as much water as could be taken by 2 furrows with which they have been diverting water from the river for more than 30 years. Implying therefore that such water could not be included in an apportionment.

Held: that the respondents failed to prove (1) how much water was annually diverted by the furrows, (2) that they diverted the water regularly and throughout the 30-year period, (3) that they had acted contrary to the lower owners' rights to a reasonable share of the water, and (4) that they did not have the lower owners' consent.

Objection accordingly dismissed, the apportionment to go ahead later.

Sources Noted

1912 Act 8 s 32(b) – WLC 234.01
1916 Act 26 s 2 – WLC 234.01
Somerset West Municipality & Cape Explosives Works 1936 Uys WLC 186 WC – WLC 234.33
Southern Life Association v Du Plessis 1931 Uys WLC 165 WC – WLC 234.33
Taute v Allers 1935 Uys WLC 184 WC – WLC 234.33
Van der Merwe v Hollins 1924 Uys WLC 100 WC – WLC 234.33
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 234.16, WLC 234.29

***Struben v Certain Riparian Owners (2)* 1949 Uys WLC 235 WC**

[WLC 235 NOTES]

Judgment Date 1949-06-27. **Court** WC (Pretoria). **Judge(s)** JGV VAN SOELEN (Water Court Judge)

Also reported as *Struben v Certain Riparian Owners* 1949 Vos 57

Quick-note

Apportionment based on insufficient data – leave to apply for revision if apportionment impractical – costs

Summary

S applied for an apportionment of the normal flow of the Pienaars river. The court had previously decided (*Struben v Certain Riparian Owners (1)* 1948 Uys WLC 125 WC) that certain streams were tributaries and not co-sources of that river. Therefore it could now proceed to apportion the water of the Pienaars river proper between the 5 farms riparian to it.

Held: that apportionments are based on irrigable areas and flow volumes but since the flow gaugings were meager (as is often the case) leave is granted to the parties to alter the distribution now made by the court if it proves to be ineffective.

Application by an owner that the court orders the registrar of deeds to cancel the registration of an agreement registered against his title deed because the agreement was never signed by the then owner: refused, because the court who originally ordered the registration had to be approached.

The court ordered certain weirs to be installed and gave detailed orders as to the costs thereof and of the case in general.

Sources Noted

1912 Act 8 s 32(b) – WLC 235.01

1916 Act 26 s 2 – WLC 235.01

Grahamstown Municipality 1929 14 PH F90 CPD – WLC 235.20

Transvaal & SA Land Trust Ltd v Roux 1925 Uys WLC 105 WC – WLC 235.18

***Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1949 Uys WLC 236 C**

[WLC 236 NOTES]

Judgment Date 1949-06-29. **Court** CPD. **Judge(s)** G STEYN, L SEARLE

Also reported as *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1949 3 SA 859 C

Quick-note

Servitude of aqueduct – application to supreme court to interpret – is “a dispute or claim as to water rights” – supreme court has no jurisdiction.

Summary

A municipality gave an Irrigation Board the right to construct a canal over the municipality's property. In consideration, the municipality was given the right to draw 2 million gallons per day from the Board's dam. A further clause provided that when the water in the dam should fall to such a level that there is only one year's supply left to the municipality, the Board shall cease to withdraw water from the dam for irrigation.

In the opinion of the board the words “one year's supply” meant 730 million gallons. But the municipality said that provision for evaporation in the course of a year should be added. The municipality applied to the supreme court to interpret the clause

Held: if the agreement was to be defined, it would constitute a determination of a “dispute or claim as to water rights”; and that, as the Board had not consented to the supreme court instead of a water court determining the dispute, the supreme court had no jurisdiction in terms of s 34.

Sources Noted

1912 Act 8 s 34 – WLC 236.06, WLC 236.07

1935 Act 46 s 102 (General Law Amendment) – WLC 236.01

Calitz v Lyle 1928 Uys WLC 136 C – WLC 236.10

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 236.08, WLC 236.10

HALL & FAGAN *Water Rights* in SA ed 2 p 108 – WLC 236.09

***Gass v Escom* 1949 Uys WLC 237 WC**

[WLC 237 NOTES]

Judgment Date 1949-08-03. **Court** WC (Pilgrims Rest). **Case** 375. **Judge(s)** JGV van SOELEN (Water Court Judge)

Also reported as *Gass and Others v Escom and Others* Vos 68

Quick-note

Non-riparian land – application to divert water from river – present and future irrigable areas of lower riparian land to be proved

Summary

G and other non-riparian owners applied for permission under s 23 to divert some water from the Blyde river. Their motivation was that all the water of the river is not being used, that there is a suitable diversion point on an adjoining riparian farm, and that an allocation of water to them will not prejudice riparian owners.

A riparian owner objected on the ground that applicants have not proved (as required by r 25) the possible future use of the river's water for primary and secondary purposes.

Held: the applicants failed to prove the irrigated and irrigable areas on riparian land, which information the court needs

to decide on the present and future requirements of all land riparian to the river. Application therefore dismissed.

Sources Noted

1912 Act 8 s 23 – WLC 237.01
1912 Act 8 s 23(1) – WLC 237.09, WLC 237.11
1912 Act 8 s 32(b) – WLC 237.03
1912 GN 982 r 23 (Principles to Guide Water Courts) – WLC 237.10
1912 GN 982 r 24 (Principles to Guide Water Courts) – WLC 237.10
1912 GN 982 r 25 (Principles to Guide Water Courts) – WLC 237.10
1912 GN 982 r 27 (Principles to Guide Water Courts) – WLC 237.10

MacGregor v Beckenstrater (2) 1949 Uys WLC 238 WC

[WLC 238 NOTES]

Judgment Date 1949-08-24. **Court** WC (Pretoria). **Judge(s)** JGV van SOELEN (Water Court Judge)

Also reported as *Macgregor and Others v Beckenstrater Vos 68*

Quick-note

Agreement between owners to distribute public water to non-riparian land – no permission from water court obtained – is valid inter se

Summary

In 1925 a water court apportioned the water of the Sand river and its tributaries (one of which was the Krokodil spruit) between the riparian owners.

In 1947 the farms H and K (which had been part of the 1925 allocation) had been subdivided into several portions. Both farms were riparian to the Sand river, and K was also riparian to the Krokodil river. The water of the rivers was distributed between the portions by a system of canals and the owners thereof entered into an agreement to regulate such distribution amongst themselves. The agreement was made an order of the water court..

One of the owners (B) had breached the agreement according to the other owners (M) and M therefore applied to the water court to interpret the agreement.

B pleaded that the agreement was invalid in that farm H is not riparian to and is not in the catchment area of the Krokodilspruit and that the agreement therefore purported to divert water to non-riparian land, for which no permission was or could be given under s 23. Alternatively, B objected that the order of the previous water court (whereby it made the agreement an order of court) was ultra vires because it was made by the president sitting alone without assessors.

Held: That B was estopped from denying the validity of the agreement: it was binding on the parties thereto, even if it did not affect the rights of third parties. That part of the agreement providing that certain owners' non-riparian land may also be irrigated, was therefore also valid, at least amongst themselves.

Held: That it was unnecessary to decide whether the previous water court's order was ultra vires, because the parties now agreed that the present water court should make the agreement an order of court.

Sources Noted

1912 Act 8 s 9 – WLC 238.08, WLC 238.27
1912 Act 8 s 23 – WLC 238.20, WLC 238.21
Horton v Westminster Improvement Commission 1872 7 Ex 780 – WLC 238.30
CABABE Estoppel p 6 – WLC 238.28
De VILLIERS JER Water Law 10: Secondary use of normal flow further considered, in SALJ 1922 39 276 – WLC 238.31

Kroonstad Municipality v Maison & Edkins Pty Ltd 1950 Uys WLC 239 WC

[WLC 239 NOTES]

Judgment Date 1950-01-13. **Court** WC (Pretoria). **Judge(s)** JGV van SOELEN (Water Court Judge)

Also reported as *Kroonstad Municipality v Mason & Edkins (Pty) Ltd and Others Vos 79*

Quick-note

Protection order – right to certain quantity of water in dam – water rights of property on which water stored – not limited except by servitude

Summary

In 1922 the K municipality obtained a protection order in terms of s 15(1) to store a certain quantity of water for the primary and secondary use of the town's inhabitants. The water was (to be) stored in existing and still to be erected dams in the V river on properties owned by the respondents (M).

During the drought of 1949 the quantity of water in the dams fell seriously below the protected quantity, and K applied to the water court to prevent M from extracting water from the dams.

Held: that K neglected to have servitudes of storage registered against M's properties, as was required by s 15, and that it therefore had no right to prevent M from using water from the river.

Procedure and effect of "protection" proceedings considered.

Sources Noted

1912 Act 8 s 10(3) – WLC 239.18
1912 Act 8 s 11(5) – WLC 239.17
1912 Act 8 s 15(1) – WLC 239.12
1912 Act 8 s 15(2)(a) – WLC 239.12
1912 Act 8 s 32 bis – WLC 239.01
1934 Act 46 s 19 (Irrigation Amendment) – WLC 239.27
1949 Act 34 s 3 (Irrigation Amendment) – WLC 239.01
Wagenaar v Du Plessis (1) 1930 Uys WLC 155 A – WLC 239.26
HALL & FAGAN *Water Law of SA* ed 2 p 59 – WLC 239.19

***Sebastian v Malelane Irrigation Board (1)* 1950 Uys WLC 240 T**

[WLC 240 NOTES]

Judgment Date 1950-03-10. **Court** TPD. **Judge(s)** HHW de VILLIERS, W DOWLING

Also reported as *Sebastian and Others v Malelane Irrigation Board* 1950 2 SA 690 T

Quick-note

Irrigation board powers and duties – irrigation works vested in board —spoliation by board – removal of owner's name from schedule of irrigable areas

Summary

Riparian owners (S) acquired from their predecessor in title the right to divert water from a furrow traversing their properties. A servitude of aqueduct was registered against their properties in respect of the furrow.

When an irrigation board (M) was constituted for the area, it claimed ownership of all the irrigation works in its area. It removed the pipes leading from the furrow to S's private irrigation dams and closed the openings. S applied to the water court for a spoliation order but it was refused. On appeal:

Held: that an irrigation board has no powers other than those given to it by the Act, and s 89 empowers a board only to purchase or construct works and to maintain such works.

Held: that when S requested the board not to include their properties in the schedule of irrigable areas so that they need not pay the high levies of the board, they did not abandon their rights to the water from the furrow.

[Considered but not decided whether a board is empowered to remove or omit irrigable areas from its schedule]

Held: The board therefore had no rights to S's furrow and pipes and had therefore taken the law into its own hands and committed an act of spoliation by depriving S of their possession of an incorporeal right.

Sources Noted

1912 Act 8 s 17 – WLC 240.12
1912 Act 8 s 89 – WLC 240.07, WLC 240.11, WLC 240.14
1912 Act 8 s 89(1) – WLC 240.13
1912 Act 8 s 89(2) – WLC 240.13
1912 Act 8 s 90 – WLC 240.18
1912 Act 8 s 129(1) – WLC 240.04
1912 Act 8 s 129(2) – WLC 240.03
Middelburg Irrigation Board v Julius Koenig's Estate 1929 Uys WLC 149 T – WLC 240.18
Nienaber v Stuckey 1946 AD 1049 – WLC 240.23
Van Eck v Etna Stores 1947 2 SA 984 A – WLC 240.05
HALL & FAGAN *Water Rights of SA* ed 2 p 162 – WLC 240.13

***Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board (2)* 1950 Uys WLC 241 A**

[WLC 241 NOTES]

Judgment Date 1950-03-21. **Court** AD. **Judge(s)** EF WATERMEYER (Chief Justice), AvdS CENTLIVRES, OD SCHREINER, FP van den HEEVER, JM MURRAY (Judges of Appeal)

Also reported as *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 2 SA 420 A

Quick-note

Agreement about extraction of water in dam – application to supreme court to interpret – is “a dispute or claim as to water rights” – supreme court has no jurisdiction

Summary

A municipality (G) and an irrigation board (R) agreed that G would be entitled to a certain daily volume of water from a dam in the S river and that if the dam level fell to below a year's supply, R would cease to draw water for irrigation.

The parties disagreed what “a year's supply” meant and G applied to the supreme court for an interpretation. R objected that the matter was “a dispute as to water rights” and that in terms of s 34 of Act 8 of 1912 the court had no jurisdiction. The court agreed that if it defined the parties' rights under the agreement, it would be a judicial determination of such a dispute and that s 34 prevented it from doing that – *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1949 Uys WLC 236 C.

G appealed to the AD on the ground that s 102 of Act 30 of 1944 empowered the supreme court to determine any right

or obligation, and that a 1935 amendment to s 32 of the Irrigation Act gave a water court a similar power: therefore any court could henceforth interpret a contract concerning water rights.

Held: Jurisdiction limitations may be put on territory, subject matter, amount, parties, etc; s 34 limited jurisdiction as to subject matter; it had nevertheless become the practice that supreme courts would only consider the enforcement of contracts concerning water law if the rights had already become enforceable and were not disputed. The 1935 Act allowed the supreme court to make a declaration of rights even if there was no infringement of rights. But it did not remove the barrier from hearing a dispute as to water rights. The court therefore did not accept the argument that the supreme court can hear water disputes which have not reached the stage of actionable maturity. Appeal dismissed.

Sources Noted

1912 Act 8 s 32 – WLC 241.07, WLC 241.10, WLC 241.13, WLC 241.18, WLC 241.20

1912 Act 8 s 32 bis – WLC 241.19

1912 Act 8 s 34 – WLC 241.05, WLC 241.07, WLC 241.08, WLC 241.11, WLC 241.15, WLC 241.16, WLC 241.20

1916 Act 26 s 2 (Irrigation Amendment) – WLC 241.18

1935 Act 46 s 102 (General Law Amendment) – WLC 241.04, WLC 241.07, WLC 241.09, WLC 241.12, WLC 241.13, WLC 241.21

1944 Act 30 s 5 (Irrigation Amendment) – WLC 241.10

1944 Act 30 s 6 (Irrigation Amendment) – WLC 241.19

Geldenhuyss & Neethling v Beuthin 1918 AD 426 – WLC 241.16

***Bauchenss, R v* 1950 Uys WLC 242 T**

[WLC 242 NOTES]

Judgment Date 1950-06-05. **Court** TPD. **Judge(s)** P MILLIN, HHW de VILLIERS

Also reported as *Rex v Bauchenss* 1950 3 SA 336 T

Quick-note

Taking water from irrigation board's furrow – offence – onus on accused to prove entitlement

Summary

B was charged with unlawfully taking water out of an irrigation board furrow. He admitted that he had done so for the purpose of irrigating his lucerne. The onus was therefore on him to prove that he was entitled thereto.

His defence was that he was a riparian owner; that he was entitled to a reasonable share of the stream; that the furrow diverted water from the stream; therefore he was entitled to divert his reasonable share from the furrow.

Held: B was entitled to take water directly from the stream in his own furrow but that does not mean that he may take water out of someone else's furrow. He could not prove any entitlement or agreement with the board to use its furrow; nor did his title deed give him such right; the board's regulations moreover specifically excluded his property in allocating the furrow's water to certain owners.

Held: The fact that the furrow traversed his land without a servitude having been registered, does not entitle him to take the law into his own hands and just take its water. He should have come to an agreement with the board or applied to a water court.

Appeal dismissed and conviction and sentence confirmed.

Sources Noted

1912 Act 8 s 133(1)(b) – WLC 242.01, WLC 242.03, WLC 242.09

Harber, R v 1931 Uys WLC 166 T – WLC 242.21

Touyz, R v 1916 Uys WLC 41 C – WLC 242.09

***Haynes v King William's Town Municipality* 1950 Uys WLC 243 E**

[WLC 243 NOTES]

Judgment Date 1950-07-03. **Court** EDLD. **Judge(s)** CJ GARDNER (Judge President)

Also reported as *Haynes v Kingwilliamstown Municipality* 1950 3 SA 841 E

Quick-note

Obligation to supply water – impossibility due to drought – whether ultra vires for a municipality to award water as compensation – jurisdiction of supreme court for a declaration of rights

Summary

When a municipality (K) constructed a dam in the Buffalo river to store water for its inhabitants and surrounding areas, a lower riparian owner (H) consented to forego its rights to water from the river on condition that K would, as compensation, daily let out of its dam a certain quantity of water into the river. A servitude to that effect was registered against H's land. During a year of unprecedented drought K had to severely ration the water to its own inhabitants and refused to let the obligatory quantity of water out of its dam. H then sought an order against K for specific performance.

Held: On the argument by K that the agreement with H was invalid on the ground that it was ultra vires for K to agree to compensation in the form of supplying water (a municipality had a duty to supply its inhabitants with water but it was

not empowered to enter into contracts that would in certain circumstances deprive its inhabitants of water): the court declined to decide this question because of insufficient facts and arguments.

Held: On the question whether impossibility of performance had occurred: The severe drought of 1949 was a *casus fortuitus* and it could not have been the intention of the parties to let the agreed quantity of water flow down in case of extreme shortage. The court has a discretion and will not make a decree where it created a hardship. It held this to be such a case.

Held: The court refused the alternative application for a declaration of rights under s 138 of the Irrigation Act, because K did not consent to the supreme court's jurisdiction [as required by s 34].

Application by H therefore dismissed.

Sources Noted

1881 CAPE Act 21 s 8 – WLC 243.21
1882 CAPE Act 6 – WLC 243.04
1905 CAPE Act 27 s 186 – WLC 243.22
1906 CAPE Act 6 s 14 – WLC 243.04, WLC 243.21
1906 CAPE Act 6 s 22 – WLC 243.22
1906 CAPE Act 6 – WLC 243.02
1912 Act 8 s 138 – WLC 243.41
Blackburn Bobbin Co Ltd v Allen & Sons Ltd 1918 LJ KB 1085 – WLC 243.27
City of London v Nash 27 ER 859 – WLC 243.37
Directors of the Shrewsbury etc v Directors NWR Co 6 HL 139 – WLC 243.37
Farmers' Co-operative Society v Berry 1912 AD 343 – WLC 243.33
Gould v Kemp 39 ER 961 – WLC 243.37
Graaff-Reinet Municipality v van Ryneveld's Pass Irrigation Board (1) 1949 Uys WLC 236 C – WLC 243.42
Hersman v Shapiro & Co 1926 TPD 367 – WLC 243.26
Horlock v Beal 1916 1 AC 495 – WLC 243.29
Johannesburg Stock Exchange v Northern Transvaal (Messina) Copper Exploration Co 1945 AD 529 – WLC 243.33
New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 243.28
Peters Flamman & Co v Kokstad Municipality 1919 AD 427 – WLC 243.26
Shill v Milner 1937 AD 101 – WLC 243.33
Sun Building Society v Western Suburban and Harrow Budding Society 1921 2 Ch 438 CA – WLC 243.23
Taylor v Caldwell 1863 32 LJ QB 164, 122 ER 309 – WLC 243.29
Transvaal Property & Investment Co Ltd v Ditcher & Pretoria Municipality 1921 TPD 261 – WLC 243.33
Wedgwood v Adams 6 Beavan 600 – WLC 243.37
Yodaiken v Angehrn and Piel 1914 TPD 254 – WLC 243.27
ANSON *Contract* ed 17 p 377 – WLC 243.28
FRY *Specific Performance* ed 6 990 p 463 – WLC 243.35
LEE *Introduction to Roman-Dutch Law* ed 4 p 280 – WLC 243.26
VOET 18 6 2 – WLC 243.26
WESSELS *Contract* ed 2 2639 – WLC 243.26
WESSELS *Contract* ed 2 2657-8 – WLC 243.30
WESSELS *Contract* ed 2 2713 – WLC 243.29
WESSELS *Contract* ed 2 3119 – WLC 243.38

***Moll v Department of Irrigation* 1950 Uys WLC 244 T**

[WLC 244 NOTES]

Judgment Date 1950-08-16. **Court** TPD. **Judge(s)** L BLACKWELL, N PRICE

Also reported as *Moll v Department of Irrigation* 1950 4 SA 158 T

Quick-note

Community furrow overflowing – damage to irrigator's land – government servant's negligence – government not protected from liability

Summary

A government official opened a sluice on an irrigation scheme which resulted in the community furrows and eventually M's land being flooded. M sued the government department (D) for damages. D pleaded that M was subject to the rules of the scheme which provided particularly that D shall not be responsible for any damage resulting directly or indirectly from any community furrow or the water flowing therein.

Held: The community is responsible for their own furrows but if there is negligence on the part of some outside person (D in this case), the rule goes too far and does not protect D.

Held, as to the argument that the rule was ultra vires: the government cannot make a rule contrary to the Crown Liabilities Act and therefore cannot give D total immunity.

D was accordingly liable for the damages of M.

Sources Noted

1910 Act 1 (Crown Liability) – WLC 244.13
1914 Act 32 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 244.13
1926 GN 1543 (Hartebeestpoort Irrigation Scheme Rules) – WLC 244.02
Merricks v Transvaal Government 1906 TS 229 – WLC 244.12

***Ackerman v Fry* 1950 Uys WLC 245 T**

[WLC 245 NOTES]

Judgment Date 1950-11-30. **Court** TPD, **Judge(s)** JM MURRAY

Also reported as *Ackerman v Fry* 1951 1 SA 390 T

Quick-note

Dammed water submerging property without servitude – application for interim interdict pending perpetual interdict and damages – supreme court’s jurisdiction – dispute as to water rights or common delict

Summary

Owner F dammed a stream on her property, which caused the water to inundate the land of owner A, who then applied to the supreme court for an interdict.

F objected to the jurisdiction of the court on the grounds that it was a dispute or claim as to water rights on which a water court has sole jurisdiction; and that the same dispute was pending in a water court.

Held: A did not dispute F’s right to store water on her own property: therefore it was not a dispute as to water rights.

The pending water court matter was a request by F to allow her to store the surplus water of the stream on her property, and the present inundation problem was therefore not the same as the matter before the water court.

Held: A’s claim for a temporary interdict was for the invasion of his common law rights for which a permanent interdict and damages will later be claimed. F’s objection to the jurisdiction was therefore dismissed.

Sources Noted

1912 Act 8 s 13 – WLC 245.13

1912 Act 8 s 14 – WLC 245.13

1912 Act 8 s 33 – WLC 245.02, WLC 245.11, WLC 245.21

1912 Act 8 s 34 – WLC 245.02

1912 Act 8 s 34(1) – WLC 245.11

1912 Act 8 s 109 – WLC 245.08

De Villiers v Galloway 1943 AD 439 – WLC 245.14

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 245.16

Hough v Steenkamp 1946 Uys WLC 221 C – WLC 245.18

McIntosh v Warrenton Village Management Board 1909 C (26 SC) 249 – WLC 245.19

New Heriot Gold Mining Co v Union Government 1916 Uys WLC 43 A – WLC 245.15

Webb v East London Municipality 1917 JDR 216 – WLC 245.20

D 8 5 8 5 – WLC 245.14

VOET 39 3 2 – WLC 245.14

***Beckenstrater v MacGregor* 1950 Uys WLC 246 T**

[WLC 246 NOTES]

Judgment Date 1950-11-30. **Court** TPD. **Judge(s)** VH NESER, W DOWLING

Also reported as *Beckenstrater v MacGregor and Others* 1951 1 SA 196 T

Quick-note

Water court procedure – notices to interested persons – power to join person as party

Summary

M and others applied to a water court to interpret a water agreement between them and B. At the hearing it appeared that certain other persons would also be interested in the outcome of the case, and B objected to the fact that they were not joined. The water court did not give a ruling on B’s objection and decided against B on the merits. B appealed on the technical ground of non-joinder.

Held: The procedures of a water court were specifically made for the types of cases which it has to handle. There is provision that the registrar of the court should give notice to interested parties and to invite them to join, but the court is not empowered to order anyone to appear before it or to join in any litigation.

Sources Noted

1912 Act 8 s 37(2) – WLC 246.18, WLC 246.49

1912 Act 8 s 39(1) – WLC 246.20

1912 Act 8 s 32(b) – WLC 246.13

1912 Act 8 s 32(e) – WLC 246.21

1912 Act 8 s 32 bis(a) – WLC 246.17, WLC 246.29

1912 Act 8 s 37(1) – WLC 246.48

1912 Act 8 s 43 – WLC 246.10, WLC 246.11

1912 Act 8 s 45(1) – WLC 246.10

1917 GN 459 r 33+ (Water Court Rules) – WLC 246.41

1945 GN 872 (Water Court Rules) – WLC 246.10

1945 GN 872 r 1 (Water Court Rules) – WLC 246.12

1945 GN 872 r 6 (Water Court Rules) – WLC 246.12, WLC 246.24, WLC 246.41

1945 GN 872 r 10 (Water Court Rules) – WLC 246.14, WLC 246.19, WLC 246.41

1945 GN 872 r 26 (Water Court Rules) – WLC 246.12

1945 GN 872 Form 1 (Water Court Rules) – WLC 246.15

1945 GN 872 Form 3 (Water Court Rules) – WLC 246.16

1945 GN 872 Form 11 (Water Court Rules) – WLC 246.24
1945 GN 872 Form 12 (Water Court Rules) – WLC 246.13
Amalgamated Engineering Union v Minister of Labour 1949 3 SA 637 A – WLC 246.07, WLC 246.35
Glaeser v Warren 1921 Uys WLC 81 WC – WLC 246.40, WLC 246.44
Hemmingson re Waterkloof River 1933 Uys WLC 174 WC – WLC 246.42, WLC 246.43, WLC 246.44
HALL & FAGAN Water Rights in South Africa p 123 – WLC 246.11

***Rabie v De Wet (1)* 1951 Uys WLC 247 WC**

[WLC 247 NOTES]

Judgment Date 1951-07-10. **Court** WC (Cape Town). **Judge(s)** JE de VILLIERS (Judge President of the CPD)

Also reported as *Rabie v De Wet (10th July 1951)* Vos 87

Quick-note

Normal flow claimed by prescription – proof required that more than reasonable share taken over whole period

Summary

Some riparian owners (R) applied for a determination of the rights of all owners on the P river.

An upper owner (W) claimed that 2 tributaries were to be excluded from the determination because they originated on his farm and ran for their entire length over his farm: they were therefore private streams and he was entitled to the exclusive use of their entire normal flow. In the alternative, he claimed exclusive use to the normal flow of the P river on the ground of prescription (1908 to 1938).

R denied that the two streams were private streams because they were the main sources of the P river. R therefore abandoned this ground for his claim of exclusive use.

R also denied W's prescriptive right to the water of the P river. The court therefore proceeded to deal with this matter only. At the outset the court limited its enquiry to the summer (dry weather) flow of the river because in winter there was sufficient water for lower owners.

Held: That in order to succeed in his claim to the whole normal flow, W had to prove (a) what the normal flow was, (b) what his reasonable share thereof would be, and (c) how much more than his reasonable share he has been taking over the prescription period ("adverse use"). No gaugings were regularly made and W could prove only that he took 1 cusec.

Held: On the contrary, R could show that they had during the prescription period (the 30 years up to 1938) always received a reasonable share of the summer water: it was only thereafter that W and other upper owners greatly increased their irrigated areas and started using all the summer water.

Held: Therefore W could not prove adverse user, namely that he had deprived R of their reasonable share of the normal flow over a period of 30 years. His prescription claim was therefore dismissed.

Sources Noted

1945 GN 872 r 45 (Water Court Rules) – WLC 247.54
1945 GN 872 r 46 (Water Court Rules) – WLC 247.54
1945 GN 872 r 47 (Water Court Rules) – WLC 247.54
Colyn v De Wet 1949 Uys WLC 234 WC – WLC 247.24, WLC 247.27
Klein Berg River (1) 1918 Uys WLC 61 WC – WLC 247.24, WLC 247.25
Taute v Allers 1935 Uys WLC 184 WC – WLC 247.24
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 247.24

***Naude v Cloete* 1951 Uys WLC 248 WC**

[WLC 248 NOTES]

Judgment Date 1951-09-20. **Court** WC (Lady Grey). **Judge(s)** CG HALL

Also reported as *Naude en Schlebusch v Cloete* Vos 83

Quick-note

Stream disappearing – whether water rising lower down is continuation of stream –subterranean channel to be proved.

Summary

Farmer C built a weir in a streamlet on his farm from which he irrigated his lands. Lower owner N complained that C was using water which should have flowed down to N. His reason was that there was a servitude on farm C which obliged C to allow all water which flowed over his farm from farm A above him, to flow down to farm N. N applied to court to order C to remove the weir.

C denied that the water in the streamlet came from the upper farm A. All the sources of the streamlet were fountains arising on C's farm, and it was therefore a private stream.

N argued that the water from farm A came down in a defined channel onto farm C, then disappeared at a certain mound, and then re-appeared in the fountains which fed the streamlet: the fountain water was therefore water from farm A.

HELD: N could not prove that the water from A which disappeared at the mound, flowed in a defined underground channel to the fountains. The water dammed by C in the streamlet was therefore not proved to be water from A. Nor was it proved that the streamlet was a public stream or, even if it was a public stream, that the weir prevented floodwater from reaching farm N. Application dismissed.

Sources Noted

Great Fish River Irrigation Board v Southey (2) 1928 Uys WLC 141 WC – WLC248.22
Taylor re Sabalele Stream 1932 Uys WLC 170 WC – WLC248.23

***Rabie v De Wet (2)* 1951 Uys WLC 249 WC**

[WLC 249 NOTES]

Judgment Date 1951-11-07. **Court** WC (Robertson). **Case** 308. **Judge(s)** JE de VILLIERS (Judge President)

Also reported as *Rabie v De Wet and Others (7th November 1951)* Vos 97

Quick-note

Apportionment – notice to be given to all owners which may be affected – owners not notified may intervene

Summary

Riparian owners (R) applied for an apportionment of their section of the river. They gave notice of the application only to 3 upper riparian owners (W) who were allegedly not allowing R's reasonable share of the water to flow down.

Four lower riparian owners (E) then applied to intervene in the case on the ground that they would be affected by an apportionment. R objected to the intervention of E, arguing that an applicant was entitled to choose the part of the river which he wished to be apportioned and that he need give notice only to riparian owners in that part.

HELD: The applicant has no choice as to which part of the river he wants apportioned: he must notify every riparian owner whose interest may be affected – at least all the owners of subdivisions of an original riparian farm (because each such subdivision is by law also riparian), and the owners immediately below and above the applicant. It is for the court, and not the applicant, to decide whether a particular owner has water rights or not.

HELD: Every riparian owner who was not notified and who alleges that his interests may be affected, may therefore intervene.

Sources Noted

1912 Act 8 s 2 “*riparian land*” – WLC 249.04
Irvin re Steelpoort River 1932 Uys WLC 168 WC – WLC 249.11
Rabie v De Wet (1) 1951 Uys WLC 247 WC – WLC 249.01

***SA Railways & Harbours v Thompson* 1952 Uys WLC 250 WC**

[WLC 250 NOTES]

Judgment Date 1952-04-28. **Court** WC (Pretoria). **Case** 428. **Judge(s)** M RETIEF (Water Court Judge)

Also reported as *SAS & H v Thompson en Andere* Vos 100

Quick-note

Impoundment of stream for railway purposes – raising of weir – needs of riparian owners are subsidiary to railways – compensation

Summary

The railways built a weir in a stream on land which it expropriated for the purpose of supplying water to its locomotives. After a few years it needed more water, and it applied to the water court for permission to raise the weir by 3 feet and to use all the stored water in the dam.

It gave notice to riparian owners far up and down the stream but only 2 owners downstream objected that the raising of the weir would affect their water supply for primary and irrigation purposes.

Held: That the effect of s 20 and s 21 was to give preference to the needs of the railways over the needs of riparian owners. But that compensation was to be paid to lower owners for the loss of water for primary and secondary use and to upper owners for their land inundated by the dam.

Sources Noted

1912 Act 8 s 20 – WLC 250.16, WLC 250.18, WLC 250.19, WLC 250.20
1912 Act 8 s 20(2) – WLC 250.16, WLC 250.17
1912 Act 8 s 20(3) – WLC 250.17
1912 Act 8 s 20(4) – WLC 250.17
1912 Act 8 s 21 – WLC 250.16, WLC 250.18, WLC 250.19
1912 Act 8 s 21(1) – WLC 250.17
1912 Act 8 s 21(2) – WLC 250.17
1934 Act 46 – WLC 250.16, WLC 250.17

***Rabie v Erasmus* 1952 Uys WLC 251 WC**

[WLC 251 NOTES]

Judgment Date 1952-03-24. **Court** WC (Cape Town). **Case** 308. **Judge(s)** JE de VILLIERS (Judge President of the CPD)

Also reported as *Rabie and Others v Erasmus and Others* Vos 105

Quick-note

Riparian owners' rights to normal flow – whole normal flow used for 30 years by several upper owners – whether a

group can acquire rights by prescription.

Summary

Riparian owners (R) applied for an apportionment of the water of the stream. Lower owners (E) intervened, claiming in their plea a share in the water. R's reply to the plea was that E had lost all rights to the normal flow because R and other upper owners had been using the normal flow for 30 years; that by prescription R and the other upper owners had therefore acquired the rights; and that E had lost those rights.

E excepted that it was not alleged who used how much or what share of the water or what E's reasonable share would be; and that the use of the water by the upper owners in varying quantities and not necessarily simultaneously did not deprive the lower owners of their rights.

HELD: If a group or body of independent riparian owners can add together their respective and independent appropriations of the whole of the normal flow, thus cumulatively arriving at a continuous period in excess of 30 years, they can claim that the requirements of prescription have been satisfied by them as a group. Thereby the rights of a lower riparian owner's reasonable share in the water would vest in the group as such, though not in any particular member thereof.

HELD: In the present case the upper owner who made the allegation of such use by himself and the other upper owners, could not prove the quantities and periods required for such a claim based on prescription.

Sources Noted

1945 GN 872 r 45 (Rules of Court) – WLC 251.50

1945 GN 872 r 46 (Rules of Court) – WLC 251.50

1945 GN 872 r 47 (Rules of Court) – WLC 251.50

Klein Berg River (1) 1918 Uys WLC 61 WC – WLC 251.26

Klein Berg River (2) 1919 Uys WLC 65 WC – WLC 251.17, WLC 251.39, WLC 251.47

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 251.21, WLC 251.42, WLC 251.46

Rabie v De Wet (1) 1951 Uys WLC 247 WC – WLC 251.02

Rabie v De Wet (2) 1951 Uys WLC 249 WC – WLC 251.05

Taute v Allers 1935 Uys WLC 184 WC – WLC 251.25

Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 251.44, WLC 251.45, WLC 251.48

Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 251.26

VOET 8 1 2 – WLC 251.45

VOET 8 1 3 – WLC 251.45

Oosthuizen, R v 1952 Uys WLC 252 T

[WLC 252 NOTES]

Judgment Date 1952-07-02. **Court** TPD. **Judge(s)** N PRICE, ER ROPER

Also reported as *R v Oosthuizen* 1952 3 SA 541 T

Quick-note

River board by-laws – ultra vires

Summary

An irrigator took water at night from a furrow leading water from a river and was charged with contravening a river board regulation which provided that all water abstracted from the river “shall be returned each day during the period from sundown to sunrise and on Sundays”. He was found guilty and appealed on the ground that the regulation was ultra vires.

HELD: The literal meaning of the regulation was that irrigators may not use any water from the furrow because all water abstracted had to be returned at night and on Sundays. This was not only absurd but a river board was not empowered to forbid the use of water from its furrows.

HELD: A court should interpret a law as written, and cannot rewrite it to arrive at a supposed intention.

Sources Noted

1912 Act 8 s 61 – WLC 252.12

1912 Act 8 s 62 – WLC 252.12

1912 Act 8 s 76 – WLC 252.04, WLC 252.12, WLC 252.13

1912 Act 8 s 133 – WLC 252.01, WLC 252.13

1950 GN 1871 r 2(1) (Ohrigstad River Board Bylaws) – WLC 252.01, WLC 252.04, WLC 252.07, WLC 252.11, WLC 252.12

Feinstein v Baleta 1930 AD 319 – WLC 252.13

Magor and St Mellons v Newport Corporation 1951 2 All ER 841 – WLC 252.10

Minister of Justice: In re Rex v Jacobson and Levy 1931 AD 466 – WLC 252.23

Naidoo v Pretoria Municipality 1927 TPD 1013 – WLC 252.14

Patel, R v 1944 AD 379 – WLC 252.24

Reid Estate v Goodwin 1920 AD 367 – WLC 252.22

Zacky v Germiston Municipality 1926 TPD 380 – WLC 252.14

MAXWELL *Interpretation of Statutes* ed 7 p 198 – WLC 252.19, WLC 252.21

Standerton Municipality re Vaal River 1952 Uys WLC 253 WC

[WLC 253 NOTES]

Judgment Date 1952-07-11. **Court** WC (Pretoria). **Judge(s)** M RETIEF

Also reported as *Ex Parte Standerton Municipality Vos 115*

Quick-note

Permission to use water for other purposes – 1912 Act 8 s 20(2), (3)

Summary

The town lands of the S municipality are riparian to the Vaal river and its 700 irrigable morgen would be entitled to 14 cusecs of water from the river. The municipality applied to the water court for permission to use 12 of those cusecs for tertiary (industrial) purposes instead of for irrigation, because industries were being attracted to the town and they needed the water.

Held: That s 20 gives the court a discretion to grant such permission; that the extent of the substitution depends on the purpose of the proposed use; that the proposed purpose in this case is necessary, desirable and reasonable; that provision should be made for the rights of lower owners; that it was not the court's duty to lay down conditions for future pollution.

Sources Noted

1912 Act 8 s 11 – WLC 253.31

1912 Act 8 s 18 – WLC 253.65

1912 Act 8 s 20 – WLC 253.36, WLC 253.37

1912 Act 8 s 20(2) – WLC 253.15

1912 Act 8 s 20(3) – WLC 253.04, WLC 253.15, WLC 253.29, WLC 253.31, WLC 253.32, WLC 253.53, WLC 253.63, WLC 253.76

1912 Act 8 s 20(4) – WLC 253.32

1912 GN 982 r 32 (Principles to Guide Water Courts) – WLC 253.37

1912 GN 982 r 34 (Principles to Guide Water Courts) – WLC 253.37

1912 GN 982 r 40 (Principles to Guide Water Courts) – WLC 253.36, WLC 253.37

1912 GN 982 r 42 (Principles to Guide Water Courts) – WLC 253.37

Clydesdale (Transvaal) Collieries Ltd v Witbank Municipality 1946 Uys WLC 220 A – WLC 253.37

Rabie v De Wet (3) 1952 Uys WLC 254 WC

[WLC 254 NOTES]

Judgment Date 1952-08-27. **Court** WC (Cape Town). **Judge(s)** JE de VILLIERS (Judge President of the CPD)

Also reported as *Rabie v De Wet Vos 126*

Quick-note

Apportionment – determining reasonable use – depends on circumstances and degree – no single principle applicable

Summary

Application to apportion the normal flow of a public stream between the subdivisions of several original riparian farms.

Applicants contended that the available water be divided pro rata according to the irrigable areas on the present subdivisions. Respondents contended that it be divided according to the irrigable areas of the original farms (the so-called Pietersburg principle).

HELD: The considerations which a water court are to follow, are those set out in the regulations. They are that reasonable use depends on the circumstances, including the extent of the irrigable land, the distance the water would have to flow, and the sources of supply. The court is therefore given a very wide discretion and it cannot be bound by a single formula like the Pietersburg principle.

Sources Noted

1912 GN 982 r 1 (Principles to guide Water Courts) – WLC 254.15, WLC 254.16, WLC 254.20, WLC 254.30

1912 GN 982 r 2 (Principles to guide Water Courts) – WLC 254.15, WLC 254.17, WLC 254.19, WLC 254.30

1912 GN 982 r 9 (Principles to guide Water Courts) – WLC 254.15, WLC 254.30

1912 GN 982 r 9(iv) (Principles to guide Water Courts) – WLC 254.18

1912 GN 982 r 9(v) (Principles to guide Water Courts) – WLC 254.18

1912 GN 982 r 9(vii) (Principles to guide Water Courts) – WLC 254.20

1912 GN 982 r 10 (Principles to guide Water Courts) – WLC 254.20

1945 GN 872 r 44 (Water Court Rules) – WLC 254.29

1945 GN 872 r 45 (Water Court Rules) – WLC 254.29

1945 GN 872 r 46 (Water Court Rules) – WLC 254.29

Rabie v De Wet (1) 1951 Uys WLC 247 WC – WLC 254.01

Rabie v De Wet (2) 1951 Uys WLC 249 WC – WLC 254.01

Rabie v Erasmus 1952 Uys WLC 251 WC – WLC 254.01

Somerset West Municipality & Cape Explosives Works 1936 Uys WLC 186 WC – WLC 254.19

Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 254.07

Union Government re Modini Spruit 1938 Uys WLC 199 WC – WLC 254.03

HALL & FAGAN *Water Rights of SA* ed 2 p 286 – WLC 254.03

Sebastian v Malelane Irrigation Board (2) 1952 Uys WLC 255 T

[WLC 255 NOTES]

Judgment Date 1952-08-28. **Court** TPD. **Judge(s)** L BLACKWELL

Also reported as *Sebastian and Others v Malelane Irrigation Board* 1953 2 SA 55 TPD

Quick-note

Dispute or claim as to water rights – objection to jurisdiction of supreme court at late stage of proceedings – failure to object cannot confer jurisdiction

Summary

S claimed damages in the supreme court on the ground that the local irrigation board (M) prevented S from using the water of a public stream to which S claimed to be entitled.

The pleadings were closed and the matter was ready for trial when it occurred to M that it was a “dispute or claim as to water rights” on which only a water court has jurisdiction in terms of s 34(1), except by consent of all parties, and that no such consent was lodged.

S argued that the matter having progressed thus far without M objecting to the jurisdiction, M had impliedly consented.

HELD: That s 34(1) is plain that consent is the only exception, and moreover that such consent is to be lodged with the responsible officer of the court before any process may issue. Failure by a defendant to object cannot therefore confer jurisdiction by default

The court granted leave to M to file a special plea in bar to raise the objection to the court’s jurisdiction.

Sources Noted

1912 Act 8 s 34(1) – WLC 255.03, WLC 255.04, WLC 255.04

1917 Act 32 (Magistrates’ Courts) – WLC 255.13

Calitz v Lyle 1928 Uys WLC 136 C – WLC 255.16, WLC 255.19

Hansmann 1938 WLD 89 – WLC 255.20

Krupal v Brooklands Dairies Limited 1921 TPD 541 – WLC 255.13, WLC 255.17

Truter v Raubenheimer 1929 CPD 510 – WLC 255.18

Erasmus v Union Government 1952 Uys WLC 256 O

[WLC 256 NOTES]

Judgment Date 1952-12-12. **Court** OPD. **Judge(s)** JNC de VILLIERS

Also reported as *Erasmus and Lategan v Union Government* 1954 3 SA 415 O; and as *Erasmus & Another v Union Government* Vos 132

Quick-note

Expropriation of mineral rights for irrigation works – mineral rights included in authorisation to expropriate “land”

Summary

The Government bought E’s land for irrigation works, but E reserved the mineral rights. Afterwards the Government wanted to buy E’s mineral rights but when negotiations failed, the Government expropriated them. E applied to court to have the expropriation declared invalid on the ground that the Irrigation Act did not authorise it.

HELD: That s 98(2) authorised the Government to expropriate “land” for a Government irrigation area; that “land” included all the rights of ownership in land; and therefore also mineral rights.

Sources Noted

1903 ORC Ord 46 s 4 (Railway Expropriation of Lands) – WLC 256.09, WLC 256.10

1912 Act 8 s 98 – WLC 256.03, WLC 256.05, WLC 256.11

1912 Act 8 s 98(2) – WLC 256.04

1939 Act 46 s 9 (Irrigation Amendment) – WLC 256.03

1937 Act 47 s 71 (Deeds Registries) – WLC 256.13

Fitchat v Colonial Secretary and Central South African Railways 1910 OPD 46 – WLC 256.09, WLC 256.14

Oosthuizen v South African Railways and Harbours 1928 WLD 52 – WLC 256.14

Registrar of Deeds v Banham 1922 AD 361 – WLC 256.14

Rocher v Registrar of Deeds 1911 TPD 311 – WLC 256.06

SA Railways v Registrar of Deeds Natal 1919 NPD 66 – WLC 256.14

Simmer & Jack Proprietary Mines Ltd v Union Government (Minister of Railways and Harbours) 1915 AD 368 – WLC 256.08

Van Vuren v Registrar of Deeds 1907 TS 289 – WLC 256.12

Van Wyk Burger and Neft v Dykerman 1904 TS 1913 – WLC 256.08

McQueen v Fram 1953 Uys WLC 257 WC

[WLC 257 NOTES]

Judgment Date 1953-04-25. **Court** WC (Johannesburg). **Judge(s)** JGV van SOELEN (Water Court Judge)

Also reported as *McQueen v Fram* Vos 134

Quick-note

Normal flow – acquisition by prescription of more than reasonable share

Summary

In an apportionment case, a riparian owner (M) claimed that he and his predecessors in title had diverted and used for 30 years the whole normal flow of the stream and that the upper owner therefore had to let down the whole flow because he (M) was entitled to it by prescription.

HELD: A riparian owner cannot acquire by prescription against an upper owner a right to more than his reasonable share of the normal flow. If the upper owner had let through more than that, it was gratuitous (*precario*) and not by adverse use, which was a requirement of prescription.

Sources Noted

HALL & FAGAN *Water Rights in South Africa* p 222 – WLC 257.03

MAASDORP *Institutes of South African Law* – WLC 257.02

VOET 8 4 5 – WLC 257.03

***Nel v Joubert* 1953 Uys WLC 258 WC**

[WLC 258 NOTES]

Judgment Date 1953-06-11. **Court** WC (Swellendam). **Case** 324. **Judge(s)** CG HALL

Also reported as *Nel v Joubert* Vos 136

Quick-note

Servitude terminated by agreement – purchaser's knowledge of termination – effect of uncanceled endorsement on title deed

Summary

In what was apparently a preliminary dispute to a water apportionment case, N claimed that his property was entitled to certain water rights by virtue of a servitude registered in its favour in the deeds office.

J's plea was that, when N bought the property, the servitude had already been cancelled by agreement between the owners of the dominant and servient properties, and therefore no longer existed..

N's reply was that the endorsements of the servitude on the title deeds (which had not been cancelled when he bought the property) proved the existence of the servitude because registration is a notice to the whole world of that right; that he was therefore not required to prove its existence; that he was, moreover, unaware that the servitude had been cancelled by agreement; and that the seller (or anybody else) was therefore estopped from claiming that the servitude had expired.

HELD: That a purchaser cannot merely rely on the fact that the title deeds were endorsed with the servitude: he has to prove that at the time of the sale he was aware of the endorsement and that he was unaware of the cancellation. Held that N submitted no evidence on these facts and he therefore failed to shift his burden of proof. His claim that the servitude was still valid, was therefore dismissed.

Sources Noted

Hawkins v Munnik 1828-49 C (1 Menz) 465 – WLC 258.04, WLC 258.12

Jansen v Fincham 1891-2 C (9 SC) 289 – WLC 258.05

Ridler v Gartner 1920 TPD 260 – WLC 258.05

***Scholtz v African Realty Trust Ltd* 1953 Uys WLC 259 WC**

[WLC 259 NOTES]

Judgment Date 1953-08-31. **Court** WC (Pretoria). **Judge(s)** M RETIEF (Water Court Judge)

Also reported as *Scholtz v African Realty Trust Ltd* Vos 138

Quick-note

Proof that stream is public – whole normal flow acquired by prescription

Summary

S claimed that he was a riparian owner on the M river; that it was a public stream; and that upper riparian owner A was using the whole normal flow of the river and not letting S's reasonable share flow down. He applied to a water court for a declaration as to his water rights.

A argued that the channel of the river below a certain point on A's farm could not be regarded as a public stream, because the normal flow disappears into the dolomitic ground and never re-appears, and the channel from that point onwards over S's farm is always dry except for floodwater.

A admitted that above the point where the water disappeared, he stored the normal flow in dams; but he argued that even if the stream was held to be a public stream below that point, it would be useless to let water flow down to S, because it would all disappear into the dolomite.

A further argued that if the channel is held to be a public stream below its point of disappearance, A had acquired by prescription the right to the whole normal flow.

HELD: That the evidence showed that the normal flow would reach S's farm if it had not been for A's storage works; therefore it was a public stream.

HELD: That A had however proved that he used the whole normal flow for 30 years without stealth, force or consent and adverse to S's right to a share of the flow; A had therefore acquired by prescription the right to the whole normal flow.

Sources Noted

1912 Act 8 s 2 "public stream" – WLC 259.132, WLC 259.139
1912 Act 8 s 11 – WLC 259.71
1912 Act 8 s 19 – WLC 259.29, WLC 259.38
1912 GN 982 r 10 (Principles to Guide Water Courts) – WLC 259.174
Boshoff v Reinhold & Co 1920 AD 29 – WLC 259.80
Du Toit v Potgieter 1898 C (8 CTR) 467 – WLC 259.105, WLC 259.108
Harty v Douglas 1930 Uys WLC 157 WC – WLC 259.94
Klein Berg River (2) 1919 Uys WLC 65 WC – WLC 259.128
Molteno Municipality re Stormberg Spruit 1917 Uys WLC 49 WC – WLC 259.149
Rand Water Board re Vaal River 1916 Uys WLC 40 WC – WLC 259.73, WLC 259.92, WLC 259.109
Somerset West Municipality & Cape Explosive Works 1936 Uys WLC 186 WC – WLC 259.98
Southern Life Association v Du Plessis 1931 Uys WLC 165 WC – WLC 259.98
Taute v Allers 1935 Uys WLC 184 WC – WLC 259.98, WLC 259.101, WLC 259.105
Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 259.81, WLC 259.90
Van Tonder v Van Niekerk 1943 Uys WLC 209 WC – WLC 259.92, WLC 259.109
Venter v De Villiers 1916 Uys WLC 42 WC – WLC 259.89
Wagenaar v Du Plessis (2) 1931 Uys WLC 163 WC – WLC 259.48, WLC 259.137, WLC 259.153, WLC 259.154
HALL & FAGAN *Water Rights in South Africa* ed 2 p 11 – WLC 259.146
HALL & FAGAN *Water Rights in South Africa* ed 2 p 223-5 – WLC 259.81, WLC 259.107, WLC 259.121
De VILLIERS *JER Water Law 3: The 8th Section Again: Public Streams*, in SALJ 1921 38 p 13 – WLC 259.120, WLC 259.121

Kruth v Jan Fourieskraal Irrigation Board 1953 Uys WLC 260 C

[WLC 260 NOTES]

Judgment Date 1953-10-14. **Court** CPD. **Judge(s)** JE DE VILLIERS (Judge President), HEP WATERMEYER

Also reported as *Kruth v Jan Fourieskraal Irrigation Board* 1953 4 SA 686 C

Quick-note

Irrigation board regulations – owner failing to clean furrow – board claiming costs to do work plus penalty – penalty regulation ultra vires

Summary

A member of an irrigation board failed to clean the board's furrow over his farm, as he was obliged to do under the board's regulations. The board had to hire a workman to do the cleaning, and it claimed compensation from the member for its expenses. It also claimed the penalty which its regulations authorised if a member should fail to do such work.

The magistrates' court allowed both claims. The member appealed.

HELD: The Irrigation Act allowed irrigation boards to make regulations for the payment of compensation in a case such as this. But the Act did not allow a board to make regulations for penalties other than those stipulated in the Act itself.

This board's regulation to pay a penalty was therefore ultra vires.

[An irrigation board is authorised by the Act to make "bylaws", and whenever the judge used the word "regulation" in stead of "bylaw", it was changed – Ed]

Sources Noted

1912 Act 8 s 16(2) – WLC 260.41
1912 Act 8 s 89(2) – WLC 260.40
1912 Act 8 s 95(1)(b) – WLC 260.41
1912 Act 8 s 95(2) – WLC 260.41
1912 Act 8 s 133 – WLC 260.47
1912 Act 8 s 133(2) – WLC 260.42, WLC 260.45, WLC 260.46
1912 Act 8 s 134 – WLC 260.42
Nel, R v 1931 Uys WLC 164 T – WLC 260.45
Parsotam, R v 1949 4 SA 315 – WLC 260.44
Schwartz, R v 1931 TPD 142 – WLC 260.32
Tobacco Manufacturers' Committee v Green & Sons 1953 3 SA 480 A – WLC 260.39
Westelike Provinsie Ko-operatiewe Tabakkwekers Maatskappy Bpk v Psaltis 1938 CPD 165 – WLC 260.39

Pietersburg Municipality re Tertiary Use 1954 Uys WLC 261 WC

[WLC 261 NOTES]

Judgment Date 1954-04-26. **Court** WC (Pietersburg). **Judge(s)** M RETIEF (Water Court Judge)

Also reported as *Ex Parte Pietersburg Municipality* Vos 182

Quick-note

Public water required for municipal purposes – is "tertiary use" – is in public interest – proof of normal and surplus flow not necessary – notice to affected owners

Summary

The municipality of Pietersburg applied to the water court under s 20 for consent to abstract water from a public stream for industrial and municipal purposes. Some riparian owners opposed the application because it would reduce the stream's water available to them. They lodged several technical objections and at the close of the applicant's case they requested the dismissal of the application.

HELD: (1) Water required for municipal inhabitants could be applied for under s 20 because water treatment by a municipality was an industry;

(2) It was prima facie in the public interest;

(3) It was not necessary to prove the normal or surplus flow because the municipality applied for a certain number of cusecs and not for a percentage of the flow;

(4) The problem that notice was not given to all riparian owners whose water rights may be affected, can be met by imposing suitable conditions.

The request for absolution was therefore dismissed, and the court could later proceed to deal with the merits of the municipality's application.

Sources Noted

1912 Act 8 s 11 – WLC 261.15, WLC 261.38, WLC 261.44, WLC 261.46, WLC 261.48

1912 Act 8 s 11(4) – WLC 261.09

1912 Act 8 s 20 – WLC 261.44

1912 Act 8 s 20(1) – WLC 261.02, WLC 261.19, WLC 261.20, WLC 261.23, WLC 261.25, WLC 261.27, WLC 261.32

1912 Act 8 s 20(2) – WLC 261.07, WLC 261.09

1912 Act 8 s 20(4) – WLC 261.22, WLC 261.51, WLC 261.52

1912 Act 8 s 21 – WLC 261.33

1912 Act 8 s 131 – WLC 261.10

1939 TRANSVAAL Ord 17 s 81 (Local Government) – WLC 261.10

1939 TRANSVAAL Ord 17 s 83 (Local Government) – WLC 261.10

1939 TRANSVAAL Ord 17 s 84 (Local Government) – WLC 261.10

Clydesdale (Transvaal) Collieries Ltd v Witbank Municipality 1946 Uys WLC 220 A – WLC 261.18, WLC 261.24, WLC 261.25

Consolidated Murchison Goldfields & Development Co Ltd 1937 WC (unreported) – WLC 261.34

Frasers Ltd 1946 WC (unreported) – WLC 261.33, WLC 261.35

HALL & FAGAN *Water Rights in SA* ed 2 p 75 – WLC 261.32, WLC 261.37

Municipal Council of Bulawayo v Bulawayo Water Works Co Ltd 1915 AD 611 – WLC 261.26

Reitz Municipality 1953 WC (unreported) – WLC 261.18, WLC 261.19, WLC 261.20

Van Marseveen re Crocodile River 1914 Uys WLC 19 WC – WLC 261.33

***Clanwilliam Municipality v Braude* 1954 Uys WLC 262 C**

[WLC 262 NOTES]

Judgment Date 1954-06-11. **Court** CPD. **Judge(s)** CG HALL

Also reported as *Clanwilliam Municipality v Braude* 1954 3 SA 657 C

Quick-note

Irrigation furrow – in such serious disrepair that replacement required – whether obligation to maintain includes replacement.

Summary

A municipality and a land owner (B) agreed to jointly use a furrow diverting water from a river. The municipality would be liable for “maintaining the furrow in a proper state of repair” and B would refund half the cost. After about 30 years the municipality laid pipes in a certain portion of the furrow because the concrete lining had deteriorated to such an extent that it was beyond repair.

But B refused to pay his half, arguing that laying pipes in the place of a concrete furrow was not what the contract intended by “maintaining”. The municipality sued.

HELD: The agreements are to be interpreted that both parties intended that the municipality would assume the keeping of the furrow in a condition which precluded undue leakage of water.

HELD: B's argument that the condition of the furrow was due to the municipality's negligence in not maintaining it properly, was rejected because it was proved that the deterioration of the furrow was due to the eroding of the cement in its walls and bed through the continued passage of the acid water it carried.

HELD: Laying pipes in the place of an irreparable furrow, therefore fell within the meaning of “maintaining” in the present case. B therefore had to pay his half.

Sources Noted

Attorney General for Ireland v Lagan Navigation Co 1924 AC 877 – WLC 262.36

Attorney General v Great Northern Railway Co 1916 2 AC 356 – WLC 262.36

Bowman v Stanford 1950 2 SA 210 N – WLC 262.31, WLC 262.46

Lurcott v Wakeley and Wheeler 1911 1 KB 905, 1911 LJ 80 KB 703 – WLC 262.45

Manchester Corporation v Audenshaw Urban Council & Denton Urban Council 1928 ChD 763 – WLC 262.36

Sarkin v Koren 1950 1 SA 495 C – WLC 262.34

Sharpness New Docks and Gloucester & Birmingham Navigation Co v Attorney General 1915 AC 654 – WLC 262.35

Smith v Smith (1) 1913 Uys WLC 17 C – WLC 262.44

ANGELL [“repair”] – WLC 262.47

***Jackson v Union Government* 1954 Uys WLC 263 T**

[WLC 263 NOTES]

Judgment Date 1954-06-28. **Court** TPD. **Judge(s)** GJ MARITZ (Judge President), F RUMPF

Also reported as *Jackson and Others v Union Government* 1954 3 SA 751 T

Quick-note

Water court – award of compensation – appeal from decision under Land Settlement Act

Summary

The government expropriated farms for land settlement purposes. On failing to reach agreement about compensation, the matter was referred to a water court in terms of the Land Settlement Act. The farmers were not satisfied with the compensation determined by the water court, and appealed to the supreme court.

The government objected *in limine* that there was no right of appeal against such an order of the water court.

HELD: It was the intention of the Land Settlement Act that appeal would be possible against a water court decision such as the present just as against other water court decisions.

[The amount of compensation awarded by the water court was considered and increased by another TPD court (ROPER J and DE WET J) but was reversed by the AD – see *Union Government v Jackson* 1956 Uys WLC 273 A]

Sources Noted

1912 Act 12 (Land Settlement) – WLC 263.03

1912 Act 8 s 32 – WLC 263.14

1912 Act 8 s 39 – WLC 263.08, WLC 263.09, WLC 263.14, WLC 263.15

1912 Act 8 s 98 – WLC 263.03, WLC 263.06, WLC 263.07, WLC 263.10, WLC 263.16

1912 Act 8 s 98(3) – WLC 263.07, WLC 263.13

1934 Act 46 s 9 (Irrigation Amendment) – WLC 263.06

1936 Act 18 s 13 (Natives Trust and Land) – WLC 263.10, WLC 263.11, WLC 263.13

1937 Act 29 s 4 (Unbeneficial Occupation of Farms) – WLC 263.10, WLC 263.12, WLC 263.13

1944 Act 42 s 4 (Land Settlement Amendment) – WLC 263.01, WLC 263.03, WLC 263.04, WLC 263.13, WLC 263.16

National Telephone Co v His Majesty's Postmaster General 1913 AC 546 HL – WLC 263.17

Union Government v Maile 1942 Uys WLC 205 A – WLC 263.10

***De Wet & Seuns Edms Bpk v Jordaan* 1954 Uys WLC 264 WC**

[WLC 264 NOTES]

Judgment Date 1954-08-03. **Court** WC (Cape Town). **Judge(s)** N OGILVIE-THOMPSON

Also reported as *De Wet & Seuns (Edms) Bpk v Jordaan* Vos 172

Quick-note

Apportionment by water court of river's water – court order not dealing with earlier servitude concerning two of the riparian properties – question whether servitude still in force not res judicata.

Summary

In 1952 a river's water was apportioned by the water court on a percentage basis. It was left to the riparian owners to come to an agreement on the distribution of the water on a turn and time basis.

But a dispute arose on whether a 1907 servitude affecting two of the riparian properties was still applicable. The servitude provided that the upper property was entitled to all water arising on or flowing over it and was not obliged to let any water flow down to the lower property.

The lower owner denied that the servitude remained applicable after the 1952 apportionment. The upper owner then applied to the water court for a declaration on the status of the servitude.

The lower owner argued that the apportionment had brought about a new system of water division for that section of the river; that it had in effect cancelled the servitude; that no mention was made of the servitude in the formal order of court; that the matter was therefore finally disposed of by a court of law and that according to the rule of res judicata no further litigation on the question was allowed.

The court dealt with the authorities on res judicata, and what records of the prior proceedings may be examined to find out whether the particular matter was dealt with and disposed of.

HELD: The 1952 judge stated in his reasons for judgment that he had not dealt with the 1907 servitude because it was not referred to in the evidence or arguments but that it "will doubtless fall to be considered" by the parties when they regulate the distribution of the water amongst themselves. The implication was therefore that the terms or the continued effect of the servitude were not decided by the judge, and that it was not a res judicata.

HELD: The servitude is only binding on the two properties involved, and cannot affect other riparian owners' rights under the common law or the Irrigation Act, 1912.

Sources Noted

1912 Act 8 s 32(b) – WLC 264.11, WLC 264.30, WLC 264.33, WLC 264.34, WLC 264.35, WLC 264.36, WLC 264.39, WLC 264.42, WLC 264.43

1912 Act 8 s 32(b)(bis) – WLC 264.01

1916 Act 26 s 2 – WLC 264.34
 1945 GN 872 r 45 (Water Court Rules) – WLC 264.59
 1945 GN 872 r 46 (Water Court Rules) – WLC 264.59
 1945 GN 872 r 47 (Water Court Rules) – WLC 264.59
Allsop and Joy's Contract 61 LT 213 – WLC 264.22
Ball v Erasmus 1927 Uys WLC 130 WC – WLC 264.36,
Bantu Reformed Apostolic Church v Ninow and Michael 1947 1 SA 187 – WLC 264.24
Bertram v Wood 1893 C (10 SC) 177 – WLC 264.12
Boshof v Union Government 1932 TPD 345 – WLC 264.12, WLC 264.31
Camphor re Hex River 1921 Uys WLC 73 WC – WLC 264.37, WLC 264.40
Cohn v Rand Rietfontein Estates Ltd 1939 TPD 319 – WLC 264.24
Commissioner of Customs v Airton Timber Co Ltd 1926 CPD 351 – WLC 264.19, WLC 264.24, WLC 264.31
Eloff re Diversion 1929 Uys WLC 144 WC – WLC 264.38
Houston v Marquis of Sligo 29 Ch 448 – WLC 264.21
Klein Berg River (2) 1919 Uys WLC 65 WC – WLC 264.11
Manasewitz R v 1933 AD 165 – WLC 264.31
Marks and Kantor v Van Diggelen 1935 TPD 29 – WLC 264.23
Ord v Ord 1923 2 KB 432 – WLC 264.17
Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 264.35
R v Inhabitants of Hartington – WLC 264.32
Reid v Van der Merwe 1926 Uys WLC 122 T – WLC 264.39, WLC 264.41
Somerset West Municipality & Cape Explosive Works Ltd 1936 Uys WLC 186 WC – WLC 264.36, WLC 264.41, WLC 264.43, WLC 264.44
Van Heerden v Smit 1915 Uys WLC 36 C – WLC 264.35
Waine v Crocker 1862 3 De GF & J 421 – WLC 264.27
Want v Moss and Wife 70 LT 178 (PC) – WLC 264.22
 HALL & FAGAN *Water Rights in SA* ed 2 p 99 – WLC 264.39
 HALSBURY ed Hailsham 13 483 – WLC 264.13
 HALSBURY ed Hailsham 13 497 – WLC 264.23
 PHIPSON *Evidence* ed 9 434 – WLC 264.20, WLC 264.26
 SPENCER BOWER *Res Judicata* 173-5 – WLC 264.19, WLC 264.25
 SPENCER BOWER *Res Judicata* 162 – WLC 264.30, WLC 264.32
 VOET 44 2 1 – WLC 264.12

***Uys v Joubert* 1954 Uys WLC 265 WC**

[WLC 265 NOTES]

Judgment Date 1954-09-04. **Court** WC (Johannesburg). **Judge(s)** JGV van SOELEN (Water Court Judge)

Also reported as *Uys v Joubert* Vos 190

Quick-note

Water court may permit non-riparian owner to use public stream water for secondary purposes

Summary

The owner of a non-riparian farm (U) bought from the owner of a riparian farm (B) one-half of B's riparian water rights. U then applied to a water court to confirm that he was entitled, for primary and secondary purposes, to at least 6 cusecs from the river via farm B, and to extract it from the river at a certain convenient point on government property.

Lower riparian owners (J) excepted that U had no right to water for secondary purposes via a riparian owner.

HELD: That s 20(3) empowers a water court to permit "any person" to use water from a public stream for secondary purposes. Exceptions dismissed.

Sources Noted

1912 Act 8 s 12 – WLC 265.07, WLC 265.08

1912 Act 8 s 20(1) – WLC 265.11

1912 Act 8 s 20(3) – WLC 265.10, WLC 265.11, WLC 265.12

1912 GN 982 r 7 (Principles to Guide Water Courts) – WLC 265.07, WLC 265.09

***Braude v Clanwilliam Municipality* 1954 Uys WLC 266 A**

[WLC 266 NOTES]

Judgment Date 1954-09-28. **Court** AD. **Judge(s)** AvdS CENTLIVRES (Chief Justice), L GREENBERG, OH HOEXTER (Judges of Appeal)

Also reported as *Braude v Clanwilliam Municipality* 1954 4 SA 669 A

Quick-note

Replacing a concrete furrow with a pipeline is not "maintenance"

Summary

A farm owner (B) and a municipality (C) agreed that B would be entitled to use the water of a furrow which was to be constructed by C, on condition that B would pay one-half of the maintenance costs.

After 30 years the furrow leaked so badly that C decided to replace a section of it with a pipe. C then claimed the cost of the pipelaying from B, who denied liability on the ground that the work done by C was not “maintenance” of the furrow as envisaged by the agreement. The supreme held against B, whereupon he appealed to the AD.
Held: The original agreement envisaged a concrete furrow to be repaired by concrete and stone whenever necessary. Laying a pipeline in stead, was not a method of conveying the water which was intended by the agreement. Therefore the laying of the pipe cannot be regarded as a repairing of the furrow and as “maintenance” for which B was liable.

Sources Noted

Lurcott v Wakely and Wheeler 1911 1 KB 905, 1911 LJ 80 KB 703 – WLC 266.18

***Plettenberg Bay Village Management Board re Keurbooms River* 1954 Uys WLC 267 WC**

[WLC 267 NOTES]

Judgment Date 1954-12-13. **Court** WC (Knysna). **Judge(s)** HEP WATERMEYER

Also reported as *Ex Parte VMB Plettenberg Bay* Vos 168

Quick-note

Use of public stream water for non-riparian village purposes – proof that sufficient water left for irrigable riparian areas

Summary

The P village management board applied to a water court for permission to use a specified daily quantity of water from a river for village purposes. The village was not riparian to the river and P therefore also applied for servitudes of abutment and aqueduct over the intervening properties.

P proved that between the proposed point of abstraction and the sea there were only 230 irrigable morgen and that there would be more than sufficient water left for them.

Held: The requirement of s 23 were fulfilled, and permission was granted to extract the requested quantity of water from the designated point in the river.

Held: That the requested servitudes are to be granted since all the affected owners have agreed thereto.

Sources Noted

1912 Act 8 s 23 – WLC 267.01, WLC 267.05, WLC 267.06, WLC 267.14, WLC 267.17

***Middelburg Municipality re Vaalbank Spruit* 1955 Uys WLC 268 WC**

[WLC 268 NOTES]

Judgment Date 1955-01-27. **Court** WC (Pretoria). **Judge(s)** M RETIEF (Water Court Judge)

Also reported as *Ex Parte Middelburg Municipality* Vos 192

Quick-note

Municipality applying for water quota from public stream – may not include residents’ irrigable areas

Summary

A municipality (M) applied to a water court for a water quota from a public stream. In order to get a larger quota, M included in its application not only its own irrigable land of 615 morgen, but also 190 morgen of irrigable land belonging to its residents, namely erven which M had sold and transferred to persons who were now ratepayers.

Held: M cannot apply for a water quota on behalf of its residents.

Sources Noted

1912 Act 8 s 20(3) – WLC 268.02, WLC 268.03

***Opperman v Great Fish River Irrigation Board* 1955 Uys WLC 269 WC**

[WLC 269 NOTES]

Judgment Date 1955-02-18. **Court** WC (Cape). **Judge(s)** CG HALL

Also reported as *Ex Parte Opperman* Vos 193

Quick-note

Protection order for dam – granted against property not in catchment area – order to be rectified and servitude cancelled

Summary

An irrigation board (G) was granted a water court’s protection order for a dam it was about to erect in a river. The required notice was given to all riparian owners on the river and its tributaries, which the board considered would be affected. Servitudes were duly registered against those properties.

Almost 30 years later the new owner of one of those properties (O) inspected his title deed and saw the servitude registered against it in favour of the board. He realised that his property was not riparian to the river or its tributaries and was not even within the catchment area of the dam. He thereupon applied for a rectification of the order and the cancellation of the servitude over his property.

The water court granted the order.

Sources Noted

1912 Act 8 s 15 – WLC 269.020

***Bothma v Kruger* 1955 Uys WLC 270 T**

[WLC 270 NOTES]

Judgment Date 1955-04-22. **Court** TPD. **Judge(s)** JF LUDORF

Also reported as *Bothma v Kruger* 1955 2 SA 666 T

Quick-note

Damages claim for breach of water rights – denial of plaintiff’s right to water – is a dispute or claim as to water rights – lack of jurisdiction raised by supreme court itself

Summary

B alleged that K had wrongfully diverted irrigation water and thereby caused damage to B’s crop of tomatoes. He sued K in the supreme court for the damages.

K in his plea had several defences, one of which was that B had no right to the water.

The court of its own accord raised the point and held that this was *prima facie* a “dispute or claim as to water rights” and that only a water court had jurisdiction. The fact that it was a claim for damages was not a reason to sue in the supreme court, because a water court may also order the payment of damages.

Sources Noted

1889 CAPE Act 40 – WLC 270.11

1912 Act 8 s 5 – WLC 270.10

1912 Act 8 s 5(3) – WLC 270.10

1912 Act 8 s 32 – WLC 270.15

1912 Act 8 s 32(a) – WLC 270.11, WLC 270.15, WLC 270.16

1912 Act 8 s 32bis – WLC 270.07

1912 Act 8 s 34(1) – WLC 270.03, WLC 270.07

1912 Act 8 s 37(3) – WLC 270.11

1944 Act 30 s 6 – WLC 270.07

Aliwal North Municipality v Jeffares 1917 Uys WLC 51 C – WLC 270.11

Burger v Burger 1937 CPD 320 – WLC 270.09

MacGregor v Beckenstrater (1) 1948 Uys WLC 232 T – WLC 270.06, WLC 270.07

Saaiman v Van der Merwe 1906 C (23 SC) 380 – WLC 270.10

Sebastian v Malelane Irrigation Board (2) 1952 Uys WLC 255 T – WLC 270.05

***Goosen v Kruger* 1955 Uys WLC 271 E**

[WLC 271 NOTES]

Judgment Date 1955-09-22. **Court** EDLD. **Judge(s)** FG REYNOLDS (Judge President)

Also reported as *Goosen v Kruger and Another* 1955 4 SA 271 E

Quick-note

Interference with furrow – claim to restore furrow and damages – whether it is “a dispute or claim as to water rights”

Summary

G and K were the owners of subdivisions of a farm. At the time of subdivision a servitude was registered against both portions whereby they would share the water which was diverted by a weir in a public stream on G’s farm. The water was led by a furrow over farm G to a diversion dam on farm K. On the way to the diversion dam the water was led over a donga on farm K by an iron chute. This manner of diverting the water carried on for more than 30 years.

Until K thought it a good idea that the floodwater flowing unused down the donga, should also be diverted to the common diversion dam. Without G’s consent, K dammed the donga, removed the chute and changed the furrow and the diversion dam. But so much water then flowed into the diversion dam that it caused damage to the dam and to G’s maize fields. G sued K for damages and restoration of the works to their original condition.

K objected to the jurisdiction of the court on the ground that it is “a dispute or claim as to water rights” over which only a water court had jurisdiction.

HELD: That there was no dispute as to the quantity of water which each owner was entitled to abstract from the diversion dam; nor as to the original manner by which the water was diverted from the river and led to the diversion dam and from there to their respective fields. The dispute was merely about the wrongful introduction into the dam of extraneous water and about changing the manner of leading the water to the dam – which manner had been fixed by prescription.

HELD: Objection to the jurisdiction overruled.

Sources Noted

1912 Act 8 s 34 – WLC 271.17

1912 Act 8 s 34(1) – WLC 271.09, WLC 271.12, WLC 271.13, WLC 271.15, WLC 271.24

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 271.17, WLC 271.24

***Barklie v Bridle* 1955 Uys WLC 272 Z**

[WLC 272 NOTES]

Judgment Date 1955-12-14. **Court** HC Southern Rhodesia (Bulawayo). **Judge(s)** THW BEADLE

Also reported as *Barklie v Bridle* 1956 2 SA 103 Z

Quick-note

Rain water – discharge on to lower urban property – natural flow altered by development – point of discharge to be reasonably convenient for both owners – discharge to street if possible.

Summary

An urban property owner (R) erected an earth bank on the boundary with his upper neighbour (A) with drainage holes in it. During heavy rain water from the upper property dammed up against the bank. A applied to court for an order that R should allow the water to be discharged at the point of its natural flow, such point being indicated by X on the plan which A submitted.

HELD: That the evidence showed that the development on A's stand altered the natural flow and intensity of the run-off from A's property; that it was impossible to determine the original course of such run-off, but that it was probably some distance from point X; that A, having changed the natural flow of rain water by developing her property, was not entitled to choose a point of discharge which was convenient to her but not to R; that in the circumstances A can easily and cheaply discharge the water to the street by making a furrow on her side of the boundary.

Application dismissed with costs.

Sources Noted

Bishop v Humphries 1919 Uys WLC 63 W – WLC 272.26, WLC 272.30

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 272.24

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 272.19

Reddy v Durban Corporation 1939 AD 293 – WLC 272.28

MAASDORP *Institutes of South African Law* 2 144 – WLC 272.21

McKERRON *Law of Delict* ed 4 p 275 – WLC 272.20

***Union Government v Jackson* 1956 Uys WLC 273 A**

[WLC 273 NOTES]

Judgment Date 1956-03-13. **Court** AD. **Judge(s)** OD SCHREINER (Chief Justice), FP VAN DEN HEEVER, OH HOEXTER, HA FAGAN, LC STEYN

Also reported as *Union Government v Jackson* 1956 2 SA 398 A

Quick-note

Compensation for irrigation works – appeal from water court – appeal court may amend findings or refer matter back – Government not liable for interest on compensation amount – but court may award a *solatium*

Summary

In 1952 the government expropriated several farms for a land settlement scheme. Two farm owners (J) did not accept the government's offer of compensation, and the water court then determined it. J was dissatisfied with the determination and appealed to the provincial division.

A preliminary objection by the government that there was no appeal against a water court's determination under the Land Settlement Act, 1944, was rejected by the court (RUMPFF J in *Jackson v Union Government* 1954 Uys WLC 159 T).

Subsequently the provincial division (ROPER J and DE WET J) heard the appeal on the merits and raised the water court's determination for both farms, and awarded interest at 6% on the amounts awarded. (The judgment of ROPER J was not reported)

The government appealed to the AD and it confirmed –

- (1) That there was an appeal against a water court determination of compensation for land settlement expropriations;
- (2) That there were no legal grounds for ordering the government to pay interest on the compensation; but that s 98(3) of the Irrigation Act empowered a court to “award a sum for inconvenience or loss likely caused by the expropriation” (such a sum being awarded in this case, inter alia because the negotiations and court cases took many years);
- (3) That a court of appeal had a discretion to alter a water court determination or to refer the matter back (in this case it altered the determination of both the water court and the provincial division).

Sources Noted

1912 Act 8 s 27(3) – WLC 273.87

1912 Act 8 s 28(1) – WLC 273.87

1912 Act 8 s 39(1) – WLC 273.43

1912 Act 8 s 98 – WLC 273.44, WLC 273.59, WLC 273.61, WLC 273.72

1912 Act 8 s 98(2) – WLC 273.50, WLC 273.51, WLC 273.72

1912 Act 8 s 98(3) – WLC 273.06, WLC 273.07, WLC 273.08, WLC 273.10, WLC 273.14, WLC 273.15, WLC 273.43, WLC 273.68, WLC 273.69, WLC 273.79, WLC 273.86, WLC 273.112
 1934 Act 46 s 9 (Irrigation Amendment) – WLC 273.44
 1936 Act 18 s 13 (Native Trust and Land) – WLC 273.44
 1937 Act 29 s 4 (Unbeneficial Occupation of Farms) – WLC 273.44
 1944 Act 42 s 4(5) (Land Settlement Amendment) – WLC 273.06, WLC 273.42, WLC 273.43, WLC 273.45, WLC 273.86, WLC 273.87
National Telephone Co Ltd v Postmaster-General 1913 AC 546 – WLC 273.46, WLC 273.47, WLC 273.48
Swift & Co v Board of Trade 1925 AC 520 HL – WLC 273.70
Union Government v Maile 1942 Uys WLC 205 A – WLC 273.44, WLC 273.56
Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 – WLC 273.62
West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 – WLC 273.57

***Thormahlen v Gouws* 1956 Uys WLC 274 A**

[WLC 274 NOTES]

Judgment Date 1956-09-10. **Court AD. Judge(s)** AvdS CENTLIVRES (Chief Justice), HA FAGAN, LC STEYN, FG REYNOLDS (Judges of Appeal), PJ VAN BLERK (Acting Judge of Appeal)

Also reported as *Thormahlen v Gouws* 1956 4 SA 430 A

Quick-note

Rain water – natural flow diverted to neighbour's land – claim for interdict and erosion damages – proof of force or stealth

Summary

Rain water flowed in an artificial furrow from farm T into a joint furrow on the boundary with farm G. G objected that the artificial furrow was unlawful because it diverted rain water which would not naturally flow in that direction, and he claimed an interdict and damages for erosion caused to farm G where the furrows joined.

T's defence was that he had the consent of the previous owner of farm G to make the furrow; that G had not objected for several years after becoming the owner of farm G; and that no erosion and therefore no damage occurred after the date of the objection.

The magistrate dismissed G's claim as unproved. On appeal, the SC reversed the decision. On a further appeal, the AD re-instated the decision, holding that since the damages claim was not based on T's fault, it should have been conducted on the basis of the common law interdict against works done on another's land by force or stealth. But that G had in any case not proved that T had done the work by stealth or force.

Sources Noted

Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 274.31
Texas Co (SA) Ltd v Cape Town Municipality 1926 A 467 – WLC 274.31
 CHRISTINAEUS *Decisiones* 4 146 – WLC 274.30
 CUJACIUS *Opera* 5 805 B, 807 B – WLC 274.26, WLC 274.29
 D 39 3 4 2 – WLC 274.27
 D 43 24 1 1-9 – WLC 274.23
 D 43 24 4 – WLC 274.24
 D 43 24 7 5 – WLC 274.25
 D 43 24 8, 11 – WLC 274.25
 D 43 24 9 3 – WLC 274.25
 D 43 24 11 4 – WLC 274.23
 D 43 24 15 7-12 – WLC 274.23
 DONELLUS *De Jure Civili* 4 15 35 3 – WLC 274.26
 HOLLANDSCHE CONSULTATIEN 3(2) 97 – WLC 274.30
 U HUBER *Heedendaegse Rechtsgeleertheit* 5 9 1 – WLC 274.28
 U HUBER *Praelectiones ad Dig* 43 24 – WLC 274.28
 VOET 43 24 – WLC 274.29
 WASSENAAR *Practijk Judicieel* 1 46 1 – WLC 274.30
 WINDSCHEID *Lehrbuch* 2 465 2 – WLC 274.24

***Germiston City Council v Chubb* 1956 Uys WLC 275 A**

[WLC 275 NOTES]

Judgment Date 1956-11-22. **Court AD. Judge(s)** OD SCHREINER, HA FAGAN, EM DE BEER, FG REYNOLDS, DOK BEYERS (Judges of Appeal)

Also reported as *Germiston City Council v Chubb & Sons Lock and Safe Co SA Pty Ltd* 1957 1 SA 312 A

Quick-note

Flooding of stand in township by road changing natural flow of rain water – municipality has statutory power to make roads – provided reasonably practical measures taken to prevent damage – landowner to prove negligent exercise of powers.

Summary

G developed a new township and sold certain stands fronting the east side of a north-south street. Rain water dammed up against the west side of the street and spilled over the street on to the stands, causing damage to C's factory. C claimed damages from G, alleging that G was negligent (1) by building the street and changing the natural flow of rain water in the area, which caused more water to flow to the stands, and (2) by failing to construct proper alternate drainage.

The supreme court granted C's claim for damages, holding that C had proved the facts on which it based G's negligence. On appeal, the AD reversed the decision, and –

Held: That, even if G's alleged facts were proved, the municipality was not responsible in law; because a municipality has statutory authority to construct roads with the least possible injury to others; it should merely take measures which are reasonably practicable in the circumstances, which include its available money and other priorities in its area; making a road on sloping ground necessarily modifies the natural drainage of the area which may affect some properties; in this case the construction of the road itself was not negligent; G made temporary drains all over the township but it was not practicable to make a special drain for C's stands.

Held: that it was therefore not necessary to decide whether a purchaser of a stand lying lower than the street, accepts that the natural flow of water has been modified.

Sources Noted

Bloemfontein Town Council v Richter 1938 A 195 – WLC 275.32, WLC 275.33, WLC 275.35

Breede River (Robertson) Irrigation Board v Brink 1936 Uys WLC 189 A – WLC 275.36, WLC 275.39

Johannesburg City Council v Vucinovich 1940 A 365 – WLC 275.34

Johannesburg Municipality v African Realty Trust Ltd 1927 A 163 – WLC 275.31, WLC 275.33, WLC 275.36, WLC 275.37, WLC 275.39

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 275.25

Reddy and Others v Durban Corporation 1939 A 293 – WLC 275.36, WLC 275.37, WLC 275.39

DONELLUS *De Jure Civili* 4 569 WLC 275.53

POTHIER *Pandects* 39 3 2 15 – WLC 275.53

VOET 39 3 5 – WLC 275.53

***Ellis v Laubscher* 1956 Uys WLC 276 A**

[WLC 276 NOTES]

Judgment Date 1956-11-28. **Court AD. Judge(s)** AvdS CENTLIVRES (Chief Justice), HA FAGAN, EM de BEER, HHW de VILLIERS, DOK BEYERS (Judges of Appeal)

Also reported as *Ellis v Laubscher* 1956 4 SA 692 A

Quick-note

Riparian owner not using water for 30 years – negative servitude not acquired by prescription.

Summary

A riparian owner did not use water from the stream for more than 30 years. A lower owner alleged that, by prescription, he had therefore acquired a negative servitude against the upper owner.

Held: A negative servitude cannot be acquired by a lower owner who constantly alleged that the upper owner has no right to water and forbidding the upper owner from using water, even if the upper owner abided thereby for the prescription period.

Sources Noted

Collen v Rietfontein Engineering Works 1948 1 SA 413 A – WLC 276.39

Consolidated Langlaagte Mines Ltd 1915 AD 1 – WLC 276.39

Hlatshwayo v Mare and Deas 1912 AD 242 – WLC 276.39

Kohler v Baartman 1895 C (12 SC) 205 – WLC 276.46

Laws v Rutherford 1924 AD 261 – WLC 276.39

Linton v Corser 1952 3 SA 685 A – WLC 276.39

Martin v De Kock 1948 2 SA 719 A – WLC 276.39

Moyce v Estate Taylor 1948 3 SA 822 A – WLC 276.39

Mullin (Pty) Ltd v Benade Ltd 1952 1 SA 211 A – WLC 276.31

Reigate v Union Manufacturing Co 1918 1 KB 592, 1918-19 All ER Repr 143; 118 LT 479, 18 LTR 483 – WLC 276.26

Van der Merwe v Viljoen 1953 1 SA 60 A – WLC 276.31

Van Heerden v Pretorius 1914 AD 69 – WLC 276.39

Van Niekerk and Union Government v Carter 1917 AD 359 – WLC 276.39

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines – WLC 276.39

VOET 8 4 5 – WLC 276.47, WLC 276.48

***Minister of Lands v Pretorius* 1956 Uys WLC 277 A**

[WLC 277 NOTES]

Judgment Date 1956-12-11. **Court AD. Judge(s)** HA FAGAN, OH HOEXTER, EM de BEER, FG REYNOLDS, HHW de VILLIERS (Judges of Appeal)

Also reported as *Minister van Lande v Pretorius* Vos 194

Quick-note

Compensation for land expropriated for raising dam wall – principles of valuing land between former access and flood levels – effect of storage servitude thereon – 1912 Act 8 s 98

Summary

In 1939 the government registered servitudes of storage on the farms of P and others to provide for the Vaal dam's inundation of the specified areas on the farms. Two levels were shown on the diagram: the lower was called the *full supply level* and the higher one the *high flood level*. The purpose of the higher level was to protect the government against damages claims in times of extraordinary floods. During the previous 15 years high flood occurred only twice but the area dried quickly so that the farmers could continue using those strips of land.

When the government wanted to raise the dam wall, it decided to expropriate the farms instead of merely acquiring new servitudes up to higher levels. The farmers were not satisfied with the compensation offered, and applied to the water court to determine it. It valued the farms by including the land between the two levels, and merely deducting the compensation which the farmers had in 1939 received for the inundation servitudes.

The government appealed to the AD against the water court's determination on the ground that the value of the land between the two levels had no market value: because the government had in effect a servitude up to the upper level and it was immaterial that the farmers sometimes used the land below that level.

Held: The AD found it preferable itself to revise the valuations, instead of referring it back to a water court which would have had to be reconstituted.

Held: The water court's determination was amended to set right some errors, but the government's appeals, based on its arguments about the value of the in-between land, were dismissed with costs

Sources Noted

1912 Act 8 s 98 – WLC 277.01, WLC 277.08

1912 Act 8 s 104(1) – WLC 277.05

1912 Act 8 s 104(2) – WLC 277.16

1934 Act 46 s 9 – WLC 277.05

1934 Act 46 s 12 – WLC 277.05

Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 A – WLC 277.21

Rabie v De Wit 1946 C 346 – WLC 277.14

Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 277.21

Union Government v Jackson 1956 Uys WLC 273 A – WLC 277.31

D 8 4 29 – WLC 277.12

HUBER *Heedensdaegse Rechtsgeleertheit* 2 13 20 WLC 277.13

VOET 8 4 13 – WLC 277.14

***Van Niekerk v Du Toit* 1957 Uys WLC 278 N**

[WLC 278 NOTES]

Judgment Date 1957-03-12. **Court** NPD. **Judge(s)** GN HOLMES

Also reported as *Van Niekerk v Du Toit* 1957 2 SA 226 N

Quick-note

Private stream – lower riparian owner can acquire a right to a reasonable share of the water by long usage

Summary

A private stream arising on T's farm flowed to N's farm for a period of more than 30 years. N claimed in court that he had thereby acquired a permanent right to a reasonable share of the water. T's defence was that the water was allowed to flow down by agreement between the parties and their predecessors in title.

Held: Use by permission (if proved) would be a good defence to an allegation that a right had been acquired by long usage.

Held: "Long usage" includes the common law concept of immemorial use (*vetustas*) and our law's concept of acquisitive prescription after 30 years' use without permission (*nec precario*).

Held: The proviso to s 8(1) is merely a confirmation that our law's prescription period is applicable in such cases.

Sources Noted

1912 Act 8 s 8(1) – WLC 278.02, WLC 278.06, WLC 278.08, WLC 278.09, WLC 278.10, WLC 278.22, WLC 278.23, WLC 278.24, WLC 278.32

De Beer v Van der Merwe 1923 Uys WLC 96 A – WLC 278.25

Jordaan v Winkelman 1879 C 79 – WLC 278.17

Ludolph v Wegner 1888 C 193 – WLC 278.27

Peacock v Hodges 1876 C 65 – WLC 278.19, WLC 278.27

Van Breda v Silberbauer 1869-71 LR PC 84 – WLC 278.15

Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 278.18, WLC 278.19, WLC 278.20, WLC 278.22

Vermaak v Palmer 1876 C (6 Buch) 25 – WLC 278.16, WLC 278.19

De VILLIERS JER *Water Law 1: The 8th section [of Act 8 of 1912]*, in SALJ 1920 37 247 – WLC 278.21

DE VILLIERS JER *Water Law 2: Existing rights*, in SALJ 1921 38 3 – WLC 278.24

GOUDSMIT 2 81 – WLC 278.25, WLC 278.26

VOET 8 3 6 – WLC 278.14

Wartburg Health Committee re Umkabela Stream 1957 Uys WLC 279 N

[WLC 279 NOTES]

Judgment Date 1957-04-11. **Court** NPD. **Judge(s)** EL JANSEN

Also reported as *Ex parte Wartburg Health Committee* 1957 2 SA 459 N; Vos 207

Quick-note

Substituted service on a 'class'

Summary

The Wartburg Health Committee applied to the water court for permission to impound and extract water from the Umkabela stream. It deemed all owners of subdivisions of all farms which are riparian to the U stream as being interested parties, but found it impractical to cite them all.

It therefore applied to the provincial division for permission to effect substituted service on such owners as a 'class' of respondents. None of the owners opposed the application.

Held: The Water Act and regulations allowed substituted service on a "class". What a "class" is, is in the discretion of the court. In the circumstances the substituted service was allowed.

Sources Noted

1956 Act 54 s 11(2)(b) – WLC 279.10, WLC 279.11

1956 Act 54 s 41(1) – WLC 279.03, WLC 279.08

1956 Act 54 s 41(5) – WLC 279.12

1956 Act 54 s 43(1) – WLC 279.06

1956 Act 54 s 55 – WLC 279.02

1957 GN 135 Form 2 (Water Court Rules) – WLC 279.08

1957 GN 135 r 5(2) (Water Court Rules) – WLC 279.02, WLC 279.05

1957 GN 135 r 6(2) (Water Court Rules) – WLC 279.08

1957 GN 135 r 7(b) (Water Court Rules) – WLC 279.08

Wartburg Health Committee v Smith 1957 Uys WLC 280 WC

[WLC 280 NOTES]

Judgment Date 1957-07-09. **Court** WC (Pietermaritzburg). **Judge(s)** A MILNE

Also reported as *Wartburg Health Committee v Smith & Others* Vos 210

Quick-note

Notice of water court hearing – water court rule 22(1) under Act 54 of 1956

Summary

In an application to abstract water from a public stream, none of the respondents opposed.

Held that notice of the hearing need be given only to opposing respondents.

Sources Noted

1956 Act 54 s 9(1)(e) – WLC 280.05

1957 GN 135 r 5(2) (Water Court Rules) – WLC 280.02

1957 GN 135 r 22(1) (Water Court Rules) – WLC 280.01

Natal Tanning Co Ltd v Minister of Water Affairs 1957 Uys WLC 281 WC

[WLC 281 NOTES]

Judgment Date 1957-09-27. **Court** WC (Pietermaritzburg). **Judge(s)** LR CANEY

Also reported as *Natal Tanning Co Ltd v Minister of Water Affairs* Vos 211

Quick-note

Application for servitude – costs

Summary

N applied for servitudes under Act 8 of 1912. The application lapsed into 183(1) of the new Act 54 of 1956 and N applied anew under the new Act and claimed that the Minister should pay the costs of the lapsed application.

HELD: The Minister was to pay such costs, but on the scale of the law applicable when the costs were incurred.

Sources Noted

1956 Act 54 s 141(1) – WLC 281.01

1956 Act 54 s 181(3)(b) – WLC 281.03, WLC 281.07, WLC 281.08, WLC 281.13

1957 GN 135 r 48 (Water Court Rules) – WLC 281.11, WLC 281.12

Feralloys Ltd v SA Native Trust 1957 Uys WLC 282 N

[WLC 282 NOTES]

Judgment Date 1957-10-24. **Court** NPD. **Judge(s)** AA KENNEDY

Also reported as *Feralloys Ltd v SA Native Trust and Others* 1958 1 SA 32 N

Quick-note

Water court proceedings – Service of process – Substituted service – No notices to respondents not opposing

Summary

Application for leave to effect substituted service on the owners of a few thousand subdivisions of originally riparian land, to notify them that the applicant (F) intend to apply to the water court for the right to abstract water from the Umsinduzi river for industrial and urban purposes because it would be impossible or very expensive to serve a notice on every “interested person” in the circumstances.

Application granted, but notices should be served on those who had notified an intention to oppose.

Sources Noted

1956 Act 54 s 41(1)(a) – WLC 282.02

1957 GN 135 Form 1 (Water Court Rules) – WLC 282.07

1957 GN 135 Form 2 (Water Court Rules) – WLC 282.09, WLC 282.10, WLC 282.17

1957 GN 135 r 7 (Water Court Rules) – WLC 282.07, WLC 282.09, WLC 282.12, WLC 282.16

1957 GN 135 r 12 (Water Court Rules) – WLC 282.18

1957 GN 135 r 14(1) (Water Court Rules) – WLC 282.05, WLC 282.06, WLC 282.08, WLC 282.12, WLC 282.13, WLC 282.16

1957 GN 135 r 22(1) (Water Court Rules) – WLC 282.05, WLC 282.08, WLC 282.10, WLC 282.18

Wartburg Health Committee 1957 Uys WLC 279 N – WLC 282.02

***Standerton Municipality v Smit* 1957 Uys WLC 283**

[WLC 283 NOTES]

Judgment Date 1957-11-12. **Court** WC (Pretoria). **Judge(s)** JF MARAIS

Also reported as *Standerton Municipality v Smit and Another* Vos 214

Quick-note

Servitude of storage – full details of calculation of compensation to be given – exception

Summary

The municipality applied for a servitude of storage over 27 morgen of S’s land. It offered compensation of £70 per morgen for certain 22 morgen and £46 per morgen for the remaining 5 morgen, based on the valuation of 3 valuers.

S excepted that insufficient details were given of the method in calculating the compensation.

Exception dismissed

Sources Noted

1956 Act 54 s 60(3)(b) – WLC 283.35

1956 Act 54 s 89(5) – WLC 283.33

1956 Act 54 s 141(6) – WLC 283.28, WLC 283.29, WLC 283.34, WLC 283.35

1956 Act 54 s 146(4) – WLC 283.35

1957 GN 135 r 5(5) (Water Court Rules) – WLC 283.02, WLC 283.13, WLC 283.15, WLC 283.17

Colonial Government v Logan 1903 C (20 SC) 343 (PC) – WLC 283.31

***Combrink v Rodeon Village Council* 1957 Uys WLC 284**

[WLC 284 NOTES]

Judgment Date 1957-12-12. **Court** WC (Pretoria). **Judge(s)** O GALGUT

Also reported as *Combrink & Nezar v Rodeon Village Council* Vos 220

Quick-note

Application for permission to abstract water– permit from Minister – simultaneous application for servitudes

Summary

A local authority applied for permission to abstract water from a public stream for urban and industrial purposes.

C excepted that a permit from the Minister was not lodged .

HELD: The permit need be lodged only at the hearing. An objection re the permit is to be made by a special plea and not by an exception. Exception dismissed.

C also applied to strike the local authority’s application, on the ground that servitudes of storage, abutment and aqueduct had to be obtained first or simultaneously be applied for.

HELD: Application to strike out dismissed.

Sources Noted

1956 Act 54 s 1 “local authority” – WLC 284.01

1956 Act 54 s 1 “use for industrial purposes” – WLC 284.13, WLC 284.30, WLC 284.31

1956 Act 54 s 1 “use for urban purposes” – WLC 284.13, WLC 284.30, WLC 284.31, WLC 284.33

1956 Act 54 s 1 “water court” – WLC 284.39

1956 Act 54 s 9 – WLC 284.14, WLC 284.22, WLC 284.25, WLC 284.29

1956 Act 54 s 10 – WLC 284.15, WLC 284.22, WLC 284.25, WLC 284.29

1956 Act 54 s 11 – WLC 284.29

1956 Act 54 s 11(1) – WLC 284.16, WLC 284.23, WLC 284.25, WLC 284.27, WLC 284.29, WLC 284.33

1956 Act 54 s 11(2) – WLC 284.17, WLC 284.18, WLC 284.24

1956 Act 54 s 11(3) – WLC 284.10, WLC 284.19, WLC 284.25, WLC 284.27, WLC 284.38
 1956 Act 54 s 12 – WLC 284.20, WLC 284.28, WLC 284.29
 1956 Act 54 s 12(5) – WLC 284.21
 1956 Act 54 s 12(6) – WLC 284.21
 1956 Act 54 s 22 – WLC 284.28
 1957 GN 135 r 2 (Water Court Rules) – WLC 284.35
Du Plessis v Nel 1952 1 SA 513 A – WLC 284.37
Goller v Van der Merwe 1903 T 157 – WLC 284.37
Ehler Pty Ltd v Silver 1947 4 SA 173 W – WLC 284.42

***De Villiers v Barnard* 1958 Uys WLC 285 A**

[WLC 285 NOTES]

Judgment Date 1958-05-21. **Court AD.** **Judge(s)** HA FAGAN (Chief Justice), EM DE BEER, DOK BEYERS (Judges of Appeal), FG REYNOLDS, CG HALL (Acting Judges of Appeal)

Also reported as *De Villiers and Another v Barnard and Another* 1958 3 SA 167 A

Quick-note

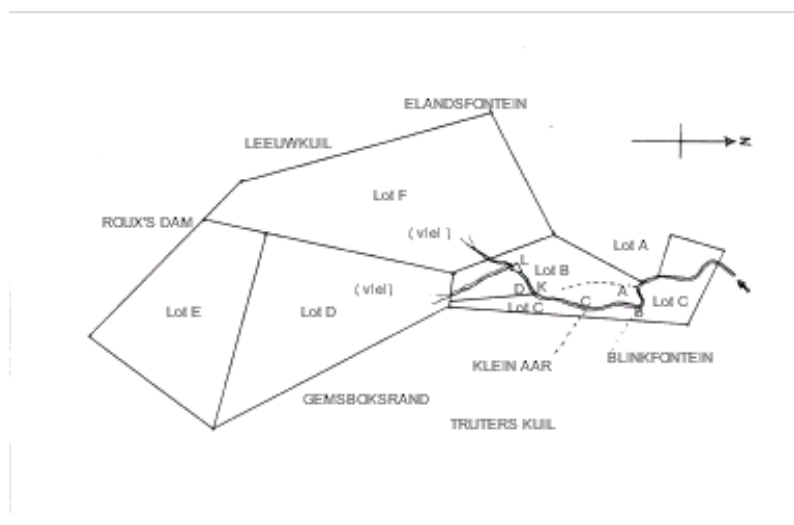
Riparian – test of – rights to surplus water

Summary

(1) The Scene

The judgments comprise almost 70 printed pages and many legal and factual points were dealt with in detail. To complicate matters further, each of the 5 parties owned one or more portions of riparian and/or non-riparian farms and each party's parcel of farms was known by an unofficial name. The diagram attached to the judgment is unfortunately difficult to interpret because it superimposes past and present farm boundaries and names, unofficial names of groups of farms, ownerships, topography, and other features.

In its place we include the following simplified sketch of the position at the time of the litigation and thereafter a short description of the scene.



The Salt river (*Soutrivier*) in the Beaufort West district is a typical dry Karoo “river”: it has no normal flow and carries flood water for an average 16 days a year only. The river flows from the north through a poort on the original farm *Salt River's Poort*, where it eventually spreads over the flat land to become vleis. The vleis extend over the boundaries of *Salt River's Poort* to the original farms *Salt River's Vlei* and *Roux's Dam* (which are the lowest farms in the area with which this case is concerned).

In 1891 *Salt River's Poort* and *Salt River's Vlei* were consolidated and re-subdivided into several farms (called Lots) apparently with the intention that each should have some share of the river and/or the vleis. When the Lots were created, they were made subject to a “fair share agreement” which regulated the diversion of the river water.

Certain artificial works on Lot B are relevant:

Where the river becomes the boundary between Lot B and Lot C, a furrow (A) from the right bank diverts water to the homestead of Lot B. Lower down the river, furrows B and C divert water from the left bank over lot C to the non-riparian farm *Klein Aar*. Where the river makes a bend to the right (at point D) into Lot B (and is no longer the boundary between Lots B and C), the owner of Lot B raised the left bank to prevent flood water from overflowing the bank and flowing away towards *Klein Aar*. At point K on the right bank there are some gullies where excess water from Lot B flows back into the river's channel. At point L, where the channel forks naturally, a weir was built to

regulate the water flowing into the left and right channels. Some distance below the weir the water no longer flows in discernible channels but spreads out over the flat veld and forms vleis on Lots D, E and F.

(2) The 1932 servitude agreement.

In 1932 the owners of Lots D and F entered into a notarial “servitude agreement” with the owner of Lot B above them whereby they acquired all the water rights of Lot B. They and their successors (the present appellants, De Villiers and another) enlarged furrow A and extended it so that most of the river’s water was diverted at A and flowed over the upper part of Lot B, back to the river via the gullies at K, and on to weir L. The intention and result was to by-pass furrows B and C in order to divert more water to the weir.

(3) The litigation

That triggered the present litigation and the owners of Lots B, C, D and E (the present respondents, Barnard and others) applied to the water court, claiming –

- (a) that Lot B is not entitled to more water than can be beneficially used on it;
- (b) that therefore lots D and F (as owners of B’s water rights) are not entitled to more than that quantity;
- (c) an order defining the quantity which Lot B may divert;
- (d) an order defining the rights of parties to the water at weir L; and
- (e) an order declaring that the original farms *Salt Rivers Vlei* and *Roux’s Dam* are not “riparian properties” and that they or their subdivisions are not entitled to water from the river.

The water court apportioned the water as claimed in (a) to (d) but ordered that water for Lots D and F is to be diverted directly out of the river (but below furrow B) and that the diversion via furrow A over the upper part of Lot B and back to the river is therefore unlawful. As to (e), the court held that the two original farms *Salt Rivers Vlei* and *Roux’s Dam* were not riparian and that no water which is to be used on their subdivisions, may be diverted from the river.

(4) The appeals

De Villiers’ appeal against all the water court’s orders, was dismissed by the CPD. His present appeal to the AD was also dismissed, except for a slight amendment to the wording of the water court’s order concerning the aqueduct. The judgment of HALL AJA is reproduced first because it sets out the facts and the issues raised. It is followed by the judgment of FAGAN CJ, which was written after he read the judgment of HALL AJA. The dissenting judgment of REYNOLDS AJA is not reproduced.

Sources Noted

1906 CAPE Act 32 – WLC 285.18, WLC 285.52, WLC 285.64
1906 CAPE Act 32 s 1 – WLC 285.70
1906 CAPE Act 32 s 3 – WLC 285.62
1906 CAPE Act 32 s 7 – WLC 285.62, WLC 285.70, WLC 285.74, WLC 285.76, WLC 285.178, WLC 285.179, WLC 285.187, WLC 285.198, WLC 285.199, WLC 285.204, WLC 285.212, WLC 285.217
1906 CAPE Act 32 s 8 – WLC 285.52, WLC 285.63, WLC 285.66, WLC 285.67, WLC 285.68, WLC 285.69, WLC 285.71, WLC 285.73, WLC 285.74, WLC 285.75, WLC 285.76, WLC 285.77, WLC 285.80, WLC 285.84, WLC 285.88, WLC 285.89, WLC 285.94, WLC 285.162, WLC 285.163, WLC 285.175, WLC 285.178, WLC 285.182, WLC 285.183, WLC 285.184, WLC 285.185, WLC 285.186 – WLC 285.188, WLC 285.191, WLC 285.192, WLC 285.193 – WLC 285.196, WLC 285.201, WLC 285.202, WLC 285.203, WLC 285.204, WLC 285.205, WLC 285.209, WLC 285.210, WLC 285.211, WLC 285.212, WLC 285.214, WLC 285.215, WLC 285.216, WLC 285.221, WLC 285.228
1906 CAPE Act 32 s 9 – WLC 285.178, WLC 285.200, WLC 285.201, WLC 285.204, WLC 285.205, WLC 285.206, WLC 285.209, WLC 285.212, WLC 285.213, WLC 285.218, WLC 285.219
1906 CAPE Act 32 s 116 – WLC 285.82, WLC 285.207
1908 CAPE Proc 362 r 117 (Irrigation Regulations) – WLC 285.83, WLC 285.185, WLC 285.208, WLC 285.209, WLC 285.211, WLC 285.218
1908 CAPE Proc 362 r 118 (Irrigation Regulations) – WLC 285.83, WLC 285.208, WLC 285.211, WLC 285.218
1908 CAPE Proc 362 r 119 (Irrigation Regulations) – WLC 285.208, WLC 285.218
1912 Act 8 Chapter 3 – WLC 285.139
1912 Act 8 s 2 “riparian land” – WLC 285.91, WLC 285.139, WLC 285.155
1912 Act 8 s 9 – WLC 285.37, WLC 285.77, WLC 285.167
1912 Act 8 s 14 – WLC 285.34, WLC 285.35, WLC 285.37, WLC 285.39, WLC 285.41, WLC 285.42, WLC 285.43, WLC 285.44, WLC 285.45, WLC 285.46, WLC 285.56, WLC 285.58, WLC 285.150, WLC 285.167
1912 Act 8 s 15 – WLC 285.35, WLC 285.78, WLC 285.81, WLC 285.223, WLC 285.224
1912 Act 8 s 16 – WLC 285.35, WLC 285.78, WLC 285.81, WLC 285.223, WLC 285.224
1912 Act 8 s 18 – WLC 285.35, WLC 285.38, WLC 285.39, WLC 285.42, WLC 285.45, WLC 285.46, WLC 285.48, WLC 285.56, WLC 285.58, WLC 285.97, WLC 285.98, WLC 285.167, WLC 285.217
1912 Act 8 s 23 – WLC 285.77, WLC 285.218, WLC 285.219, WLC 285.219, WLC 285.227
1912 Act 8 s 24 – WLC 285.65, WLC 285.77, WLC 285.89, WLC 285.136, WLC 285.137, WLC 285.139, WLC 285.150, WLC 285.162, WLC 285.163, WLC 285.175, WLC 285.191, WLC 285.215, WLC 285.216, WLC 285.221, WLC 285.228
1912 Act 8 s 32 – WLC 285.11, WLC 285.33, WLC 285.48, WLC 285.98
1912 Act 8 s 133(d) – WLC 285.167
1912 GN 982 r 18 (Principles to Guide Water Courts) – WLC 285.41
1912 GN 982 r 19 (Principles to Guide Water Courts) – WLC 285.38, WLC 285.42, WLC 285.58
1912 GN 982 r 25 (Principles to Guide Water Courts) – WLC 285.185, WLC 285.218
1912 GN 982 r 26 (Principles to Guide Water Courts) – WLC 285.218
1912 GN 982 r 27 (Principles to Guide Water Courts) – WLC 285.218
Act 46 of 1934 s 2 (Irrigation Amendment) – WLC 285.35, WLC 285.223
Act 46 of 1934 s 3 (Irrigation Amendment) – WLC 285.35, WLC 285.223
Gardens Estate Ltd v Lewis 1920 A 144 – WLC 285.101
Hamlyn & Co v Wood & Co 1891 2 QBD 491 – WLC 285.116
Mullin (Pty) Ltd v Benade Ltd 1952 1 SA 211 A – WLC 285.116
Myburgh v Van der Byl 1880-2 C (1 SC) 360 – WLC 285.126, WLC 285.132
Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 285.39, WLC 285.40, WLC 285.43, WLC 285.58, WLC 285.67

***Joubert v Minister of Water Affairs* 1958 Uys WLC 286 WC**

[WLC 286 NOTES]

Judgment Date 1958-10-14. **Court** WC (Pretoria). **Case** 453. **Judge(s)** JF LUDORF

Also reported as *Joubert en Joubert v Minister van Waterwese* Vos 226

Quick-note

Compensation for expropriation – considerations by water court – offer withdrawn – effect on costs

Summary

The State expropriated farms which would be inundated by a proposed government dam. Some of the owners refused to accept the offer of compensation and applied to the water court to determine the amount.

Held, that any decision on an amount is to be based on proven facts. There were several approaches to a valuation by the court, including the following..

- (1) Sales of other properties or rights in the area; but the court will not hold a trial within a trial if it is disputed whether a fact is comparable or not.
- (2) The evidence of expert valuers;
- (3) What a willing buyer would pay if he knew all the relevant facts;
- (4) The nature and the production capacity of the soil and whether it is irrigable;
- (5) Costs incurred in finding other land;
- (6) The value of lost quotas
- (7) The value of improvements.

Sources Noted

1956 Act 54 s 60 – WLC 286.01

1956 Act 54 s 160(2) – WLC 286.31

Union Government v Jackson 1956 Uys WLC 273 A – WLC 286.05, WLC 286.19

***Warmbaths Town Council v Warmbaths Irrigation Board* 1958 Uys WLC 287 WC**

[WLC 287 NOTES]

Judgment Date 1958-11-11. **Court** WC (Pretoria). **Judge(s)** R HILL

Also reported as *Warmbaths Town Council v Warmbaths Irrigation Board and Others* Vos 236

Quick-note

Application commenced under repealed Act 8 of 1912 – to be completed – jurisdiction to make agreement an order of court

Summary

Applicant had lodged an application under Act 8 of 1912 and, a compromise having been arrived at, sought an order in the water court constituted under Act 54 of 1956 that the agreement be made an order of court.

Held, although the court had jurisdiction to make orders in terms of agreements, that having regard to the provisions of section 181 of Act 54 of 1956, the application had to be dealt with in all respects as if the 1956 Act had not been passed and that the court had no jurisdiction to entertain the application.

The proper court to be approached was the water court constituted under Act 8 of 1912.

Sources Noted

1956 Act 54 s 181(3)(a) – WLC 287.05

Hodd v Hodd 1942 NPD 198 – WLC 287.06

Van Schalkwyk v Van Schalkwyk 1947 4 SA 86 – WLC 287.08

VOET 4 6 17 – WLC 287.06

D 42 1 26 – WLC 287.06, WLC 287.07

HALSBURY 18 501 p 188 – WLC 287.06

***Senekal Municipality re Sand River* 1958 Uys WLC 288 WC**

[WLC 288 NOTES]

Judgment Date 1958-11-13. **Court** WC (Bloemfontein). **Judge(s)** HWO KLOPPER

Also reported as *Ex parte Senekal Munisipaliteit* Vos 237

Quick-note

Storage and abstraction of public water for urban and industrial purposes – water court's consent not necessary – Minister's permit required

Summary

S Municipality was a riparian owner and applied for permission to store and abstract a certain quantity of water (for use on its riparian property) at a point on the stream where it was not the owner.

Held: The court refused to make an order because its permission was unnecessary (but a permit from the Minister was necessary).

Sources Noted

1912 Act 8 s 20(1) – WLC 288.10

1956 Act 54 s 1 “local authority” – WLC 288.01

1956 Act 54 s 8(1) – WLC 288.13

1956 Act 54 s 9 – WLC 288.16

1956 Act 54 s 10 – WLC 288.10, WLC 288.16

1956 Act 54 s 11(1) – WLC 288.18

1956 Act 54 s 11(2) – WLC 288.05, WLC 288.08, WLC 288.10, WLC 288.19

1956 Act 54 s 11(4) – WLC 288.20

1956 Act 54 s 19 – WLC 288.15

1956 Act 54 s 140 – WLC 288.16

1956 Act 54 s 140(1) – WLC 288.11

1956 Act 54 s 141 – WLC 288.12

Diamond Syndicate Ltd v Union Government and the Municipality of Windsorton 1921 NC 207 – WLC 288.14

CROSS GN *Local Authorities and the Water Act of 1956*, in SALJ 1957 74 p 21 – WLC 288.10

FARNHAM 2 528 p 1720 – WLC 288.14

HALL & FAGAN *Water rights in SA* ed 3 p 66 – WLC 288.18

***Van der Merwe v Visagie* 1959 Uys WLC 289 A**

[WLC 289 NOTES]

Judgment Date 1959-03-26. **Court AD.** **Judge(s)** OH HOEXTER, LC STEYN, EM de BEER, PJ van BLERK, N OGILVIE-THOMPSON

Also reported as *Van der Merwe v Visagie* 1959 2 SA 567 A

Quick-note

Servitude of impounding a public stream granted by water court on condition that modifications to weir are made – failure to modify – whether servitude lapses

Summary

Applicant (V) owns 3 farms in the division of Calvinia, together known as “Die Krans”. Respondent (M) owns 2 farms, together known as “Pofadderfontein”.

In 1943 Pofadderfontein’s previous owner made a weir in the Vis river on his farm causing the inundation of land on Die Krans and other damage.

In 1944 Visagie applied to the water court for the removal of the weir.

In 1945 respondent counter-applied for a servitude of impoundment under Act 8 of 1912, which the court granted, and laid down certain requirements for the weir.

The applicant now alleges that the requirements were suspensive conditions, that they were not complied with, and that the servitude had accordingly lapsed; he claims that respondent therefore be ordered to remove the weir and pay £3366 damages caused by the inundation of Die Krans.

HELD: The word “condition” in the water court’s order was not intended to mean a suspensive or a resolute condition. The servitude was granted in perpetuity and the compensation had already been paid.

Sources Noted

1912 Act 8 s 113 – WLC 289.09, WLC 289.10, WLC 289.11, WLC 289.16

1912 Act 8 s 110(1) – WLC 289.13

***Minister of Water Affairs v Van Staden* 1959 Uys WLC 290**

[WLC 290 NOTES]

Judgment Date 1959-03-26. **Court AD.** **Judge(s)** HA FAGAN (Chief Justice), OD SCHREINER, LC STEYN, WH RAMSBOTTOM, AB BEYERS (Judges of Appeal)

Also reported as *Minister of Water Affairs v Van Staden* 1959 2 SA 553 A

Quick-note

Costs re application lapsing – jurisdiction of water court to make declaratory order on costs

Summary

Any costs reasonably incurred in connection with an application which as lapsed in terms of s 183(1) includes costs reasonably incurred in the preparation for presenting the application to the water court, and the costs of the appearance at that court.

Held that it was unnecessary to decide the question whether the water court has jurisdiction to issue a declaratory order as what costs are payable.

Sources Noted

1912 Act 8 s 31 bis – WLC 290.23
1956 Act 54 s 34 – WLC 290.03
1956 Act 54 s 40(f) – WLC 290.09
1956 Act 54 s 47(2) – WLC 290.04
1956 Act 54 s 49 – WLC 290.08
1956 Act 54 s 59 – WLC 290.03, WLC 290.17, WLC 290.23, WLC 290.49
1956 Act 54 s 181(3) – WLC 290.01, WLC 290.04, WLC 290.07, WLC 290.09, WLC 290.13, WLC 290.14, WLC 290.18, WLC 290.23, WLC 290.26, WLC 290.27, WLC 290.28, WLC 290.30, WLC 290.33
1957 Proc 276 (Blyde River Government Water Control Area) – WLC 290.03, WLC 290.23
Mostert v Scholtz 1926 C 215, 406 – WLC 290.10

Benoni Town Council v Meyer (1) 1959 Uys WLC 291 W

[WLC 291 NOTES]

Judgment Date 1959-05-04. **Court** WLD. **Judge(s)** SM KUPER

Also reported as *Benoni Town Council v Meyer and Others* 1959 3 SA 97 W

Quick-note

Normal flow – interference by filling up vlei – inundation of neighbour's property – interdict

Summary

Part of M's agricultural holding was a vlei and he started to fill up the lower part of it to bring it up to the level of the municipal road.

The municipality instituted an action in the supreme court to prevent M from continuing with the filling and to restore the property to its previous position, because the water which would naturally drain into the vlei would now flood the road.

M's defence was that the filling operation was a reasonable exercise of his property rights, and he continued with his filling of the vlei.

The municipality then asked for an interdict to stop the filling while the application was pending.

HELD: (1) To divert a vlei to a neighbour's property was not a reasonable exercise of property rights;

(2) There is no longer a distinction in our law between urban and rural actions;

(3) That the balance of convenience favoured the granting of the interdict *pendente lite*.

[The substantive issue was dealt with in *Benoni Town Council v Meyer (2)* 1961 Uys WLC 305 W (below), where the interdict was confirmed]

Sources Noted

1939 TRANSVAAL Ord 17 (Local Government) – WLC 291.03
Austen Bros v Standard Diamond Mining Co Ltd 1882 NC (1 HCG) 363 – WLC 291.18, WLC 291.19
Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 291.11, WLC 291.19
Johannesburg Municipality v African Realty Trust 1927 A 163 – WLC 291.09, WLC 291.19
Kohne v Harris 1899 C (16 SC) 144 – WLC 291.15
Labuschagne v Steyn 1928 Uys WLC 140 O – WLC 291.12
Malherbe v Ceres Municipality 1951 4 SA 510 A – WLC 291.10
New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 291.13, WLC 291.19
AMERICAN RESTATEMENT OF THE LAW *Tort* 4 827-33 – WLC 291.11
HALSBURY 24 (ed Hailsham) 76 – WLC 291.10
VOET 39 3 2 – WLC 291.08
VOET 39 3 4 – WLC 291.08, WLC 291.17, WLC 291.18

Union Government v Gass 1959 Uys WLC 292 A

[WLC 292 NOTES]

Judgment Date 1959-09-25. **Court** AD. **Judge(s)** OD SCHREINER, EM de BEER, AC MALAN, PJ van BLERK, N OGILVIE-THOMPSON (Judges of Appeal)

Also reported as *Union Government v Gass* 1959 4 SA 401 A

Quick-note

Expropriation – compensation – inconvenience allowance

Summary

In 1955 the State expropriated G's property for a government irrigation scheme. G was dissatisfied with the compensation offered and in August 1956 applied to the water court to determine the amount. He inter alia asked the court to add 20% to the valuation, as provided by s 98(3) of Act 8 of 1912.

The State countered that that Act was repealed in July 1956 by Act 54 of 1956 and that s 60 thereof no longer made provision for such an additional amount.

Sources Noted

1912 Act 8 s 98 – WLC 292.01, WLC 292.42, WLC 292.52
1912 Act 8 s 98(2) – WLC 292.52

1912 Act 8 s 98(3) – WLC 292.03, WLC 292.04, WLC 292.13, WLC 292.20, WLC 292.25, WLC 292.37, WLC 292.38, WLC 292.39, WLC 292.44, WLC 292.46, WLC 292.50, WLC 292.54, WLC 292.55, WLC 292.56, WLC 292.57
 1934 Act 46 s 9 (Irrigation Amendment) – WLC 292.01, WLC 292.42
 1940 Act 21 s 11(6), 11(6)bis (Advertising on Roads and Ribbon Development) – WLC 292.12
 1956 Act 54 s 60 – WLC 292.04, WLC 292.44, WLC 292.49, WLC 292.50
 1956 Act 54 s 60(2) – WLC 292.51, WLC 292.52
 1956 Act 54 s 60(3) – WLC 292.13, WLC 292.20, WLC 292.25, WLC 292.39, WLC 292.41, WLC 292.43, WLC 292.51, WLC 292.54, WLC 292.55, WLC 292.56, WLC 292.57, WLC 292.58, WLC 292.61, WLC 292.69
 1956 Act 54 s 60(4) – WLC 292.40, WLC 292.51
 1956 Act 54 s 181 – WLC 292.46, WLC 292.47
 1956 Act 54 s 181(2) – WLC 292.52
 1956 Act 54 s 181(3) – WLC 292.48, WLC 292.49, WLC 292.52
 1957 Act 33 s 12(1)(c) (Interpretation) – WLC 292.46, WLC 292.53
 1957 GN 135 r 8 (Water Court Rules) – WLC 292.24
 1957 GN 135 r 8(9) (Water Court Rules) – WLC 292.24
Corporation of Birmingham v Barnes 1935 AC 292 – WLC 292.62
Garlick, Estate v CIR 1934 A 499 – WLC 292.28
Hamilton Gell v White 1922 2 KB 422 – WLC 292.53
Levin v Felt and Tweeds Ltd 1951 2 SA 401 A – WLC 292.33
Merber v Merber 1948 1 SA 446 A – WLC 292.33
Minister of Water Affairs v Van Staden 1959 Uys WLC 290 A – WLC 292.48
Pietermaritzburg Corporation v SA Breweries Ltd 1911 A 501 – WLC 292.13
Union Government v Jackson 1956 Uys WLC 273 A – WLC 292.19, WLC 292.26, WLC 292.56, WLC 292.61, WLC 292.70
Union Government v Maile 1942 Uys WLC 205 A – WLC 292.21, WLC 292.57

***Van Staden v Minister of Water Affairs* 1959 Uys WLC 293 WC**

[WLC 293 NOTES]

Judgment Date 1959-12-10. **Court** WC (Pilgrim's Rest). **Case** 539. **Judge(s)** Q DE WET

Also reported as *Van Staden v Minister of Water Affairs* Vos 242

Quick-note

Minister's permit to use certain quantity of water in government water control area – water court has no jurisdiction to review permit – Act 54 of 1956 s 40, 59(1)(b), 62(8), 68,

Summary

A number of farms riparian to the Blyde river had been proclaimed as a Government Water Control Area under s 59(1)(b) of the Water Act. First applicant had been issued with a permit under s 62(1) for 478 morgen feet of water per annum and had been informed that an application would be considered for a further 47.8 morgen feet under s 62(2).

Applicants had applied to have the decision of the Minister under s 62(2) reviewed.

Respondents excepted to the application.

Held that the water court had no jurisdiction to entertain such an application.

Exception allowed. Application set aside.

Sources Noted

1956 Act 54 s 40 – WLC 293.01
 1956 Act 54 s 40(a) – WLC 293.09
 1956 Act 54 s 59(1) – WLC 293.02
 1956 Act 54 s 62 – WLC 293.08
 1956 Act 54 s 62(1) – WLC 293.04, WLC 293.05, WLC 293.07, WLC 293.10, WLC 293.13, WLC 293.14, WLC 293.15, WLC 293.16, WLC 293.17, WLC 293.18
 1956 Act 54 s 62(2) – WLC 293.04, WLC 293.05, WLC 293.07, WLC 293.10, WLC 293.12, WLC 293.16
 1956 Act 54 s 62(8) – WLC 293.01, WLC 293.07, WLC 293.10
 1957 GN 135 r 11 (Water Court Rules) – WLC 293.07
Johannesburg Consolidated Investment Co v Town Council of Johannesburg 1903 T 111 – WLC 293.11

***Tapasia v SA Native Trust* 1959 Uys WLC 294 WC**

[WLC 294 NOTES]

Judgment Date 1959-12-21. **Court** WC (Pietermaritzburg). **Judge(s)** BD BURNE

Also reported as *Tapasia v SA Native Trust* Vos 247

Quick-note

Expropriation by trust created by statute – trust is not the government – compensation to be determined by water court – whether includes court constituted under new Water Act – assessors

Summary

The respondent Trust made certain expropriations as a result of which applicant claimed compensation. In terms of s 13(4) of the Native Trust and Land Act, 18 of 1936 compensation had to be determined by a water court constituted under Act 8 of 1912.

HELD: Act 8 of 1912 had been repealed and re-enacted by Act 54 of 1954, and the water court constituted under Act 54 of 1956 therefore has to determine the compensation.

HELD: In terms of s 36(1) the qualifications and number of assessors varied according to whether the compensation payable had to be determined

under certain sections of Act 54 of 1956 and/or whether the Government was a party to the proceedings. But the present case did not fall within any matter relating to the amount of compensation payable under Act 54 of 1956;
HELD: The SA Native Trust was an independent legal persona created by Act 18 of 1936 and was not the Government.
HELD: Therefore a water court created by s 34(1)(c) had jurisdiction and assessors were to be appointed in terms of s 36(1)(c).

Sources Noted

1910 Act 5 s 13(1) (Interpretation) – WLC 294.09
1912 Act 8 s 27 – WLC 294.10
1912 Act 8 s 28 – WLC 294.10
1912 Act 8 s 29 – WLC 294.10
1912 Act 8 s 30 – WLC 294.10
1936 Act 18 s 13(1) (Natives Trust and Land) – WLC 294.01
1936 Act 18 s 13(4) (Natives Trust and Land) – WLC 294.02, WLC 294.08
1936 Act 18 s 4(1) (Natives Trust and Land) – WLC 294.01
1944 Act 42 s 4(5) (Land Settlement Amendment) – WLC 294.11
1956 Act 54 s 1 “government water work” – WLC 294.20
1956 Act 54 s 2(l) – WLC 294.20
1956 Act 54 s 11(2) – WLC 294.18
1956 Act 54 s 23(1) – WLC 294.18
1956 Act 54 s 30(6) – WLC 294.20
1956 Act 54 s 34 – WLC 294.10
1956 Act 54 s 34(1) – WLC 294.01, WLC 294.23
1956 Act 54 s 35 – WLC 294.04
1956 Act 54 s 36(1) – WLC 294.04, WLC 294.05, WLC 294.12, WLC 294.21, WLC 294.23
1956 Act 54 s 36(2) – WLC 294.05
1956 Act 54 s 40(a) – WLC 294.11
1956 Act 54 s 60 – WLC 294.13
1956 Act 54 s 82(2) – WLC 294.18
1956 Act 54 s 94 – WLC 294.13
1956 Act 54 s 94(1) – WLC 294.17, WLC 294.19
1956 Act 54 s 106(2) – WLC 294.20
1956 Act 54 s 108(1) – WLC 294.18
1956 Act 54 s 110(1) – WLC 294.18
1956 Act 54 s 112 – WLC 294.13
1956 Act 54 s 113(1) – WLC 294.18
1956 Act 54 s 123(3) – WLC 294.20
1956 Act 54 s 154(1) – WLC 294.20
1956 Act 54 s 158 – WLC 294.20
1956 Act 54 s 181(1) – WLC 294.03
1957 Act 33 s 12(1) (Interpretation) – WLC 294.09
SA Railways v Kemp 1916 TPD 174 – WLC 294.14
Transvaal Cold Storage Co Ltd v Government 1910 T 622 – WLC 294.14, WLC 294.20

***Van Vuuren v Minister of Water Affairs* 1960 Uys WLC 295 WC**

[WLC 295 NOTES]

Judgment Date 1960-02-25. **Court** WC (Bloemfontein). **Judge(s)** AJ Smit

Also reported as *Van Vuuren v Minister van Waterwese* Vos 250

Quick-note

Expropriation of further servitude for raising weir – compensation – proof of waiver by predecessor of future right to compensation.

Summary

V applied to the water court to determine the compensation due to him by the Minister for land to be inundated as a result of the raising of the Vaal dam weir.

Respondent’s defence was (1) that V’s predecessor in title (long deceased) had agreed that when the weir is raised again, no further compensation would be payable; and (2) that the existing servitude contained an implied term that the previous owner agreed to the present expropriation.

HELD: That an oral agreement to amend the previous servitude agreement or an implied term was not proved.

Sources Noted

1912 Act 8 s 98 – WLC 295.03
1912 Act 8 s 104(1) – WLC 295.04
1934 Act 46 s 9 (Irrigation Amendment) – WLC 295.03
Barnabas Plein & Co v Sol Jacobson & Son 1928 AD 31 – WLC 295.50
Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 A – WLC 295.25
Du Plessis v Nel 1952 1 SA 534 A – WLC 295.48
Dutch Reformed Church Council v Crocker 1953 4 SA 53 C – WLC 295.51
Heilbut & Co v Buckleton 1913 AC 47 – WLC 295.17
Lurie, Estate v Estate McPherson 1955 2 PH A 53 A – WLC 295.55
Minister of Lands v Pretorius 1956 Uys WLC 277 A – WLC 295.24, WLC 295.45, WLC 295.46, WLC 295.61
Mullin Pty Ltd v Benade Ltd 1952 1 SA 211 A – WLC 295.51

Orr v Solomon 1907 T 281 – WLC 295.59

Reigate v Union Manufacturing Co (Ramsbottom) Ltd & Elton Cop Dyeing Co Ltd 1918 1 KB 592, 1918-19 All ER Repr 143, 118 LT 479, 18 LTR 483 – WLC 295.50

Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 295.25

***Kakamas Management Board v Louw* 1960 Uys WLC 296**

[WLC 296 NOTES]

Judgment Date 1960-03-07. **Court** AD. **Judge(s)** OD SCHREINER, OH HOEXTER, AC MALAN, WH RAMSBOTTOM, F RUMPF (Judges of Appeal)

Also reported as *Kakamas Bestuursraad v Louw* 1960 2 SA 202 A

Quick-note

Servitude – unreasonable use – damages

Summary

L owned a riparian farm on the left bank of the Orange river, his boundary being the middle of the river. He entered into a servitude agreement with the K local authority that K would build a weir in the river on K's property from which it would extract water for its use downstream. K built the weir in two sections: one section from the left bank to an island in the river, and the second section from that island to another island.

L complained that the weirs caused silting up of the hippo pool above the weir, from which he extracted water for irrigation on his farm. He ascribed the problem to K's method of constructing the weir, and claimed damages on the ground that K had not exercised its right of servitude in a reasonable manner (*civiliter modo*). The local division of the supreme court agreed with L.

The appellate division reversed the decision and held that K had not exceeded the terms of the servitude, had not exercised the servitude unlawfully or unreasonably, and that it was not proved that K's construction of the weir was faulty.

Sources Noted

1808 FRANCE Code Napoleon s 738(a) – WLC 296.145

1909 CAPE Act 10 (*Kakamas Management Board*) – WLC 296.02

1910 Proc 163 (*Kakamas Management Board*) – WLC 296.02

1948 Proc 123 (*Kakamas Management Board*) – WLC 296.02

Bloemfontein Town Council v Richter 1938 A 195 – WLC 296.58

Bonnington Castings Ltd v Wardlaw 1956 1 AER 615 – WLC 296.81

Breede River (Robertson) Irrigation Board v Brink 1936 Uys WLC 189 A – WLC 296.156

Consolidated Diamond Mines of South West Africa Ltd v Administrator SWA 1958 4 SA 572 A – WLC 296.122

Gardens Estate Ltd v Lewis 1920 A 144 – WLC 296.53

Gilliomme v Cilliers 1958 3 SA 97 A – WLC 296.91

Johannesburg Municipality v African Realty Trust Ltd 1927 A 163 – WLC 296.57

London & SA Exploration Co v Rouliot 1890-1 C (8 SC) 74 – WLC 296.41, WLC 296.46, WLC 296.47, WLC 296.48, WLC 296.139

New Heriot Gold Mining Company Ltd v Union Government 1916 Uys WLC 43 A – WLC 296.72, WLC 296.82

Silva's Fishing Corporation (Pty) Ltd v Maweza 1957 2 SA 256 A – WLC 296.82

Smith Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd 1940 AC 997 – WLC 296.71

Texas Co (SA) Ltd v Cape Town Municipality 1926 A 467 – WLC 296.55, WLC 296.101

Van den Berg v Rand Water Board 1945 A 691 – WLC 296.58

Wasserman v Union Government 1934 A 231 – WLC 296.152

D 7 1 13 2 – WLC 296.147

D 8 1 9 – WLC 296.52, WLC 296.101

DEMOLOMBE 12 n 842 – WLC 296.145

DIEPHUIS *Nederlandsch Burgerlyk Regt* 6 p 572 – WLC 296.145

GLUCK *Pandectenrecht* 10 667 p 163 – WLC 296.55, WLC 296.101

GROTIUS 2 35 6 – WLC 296.102

MATTHAEUS *De Criminibus* 47 3 4 – WLC 296.150

PARDESSUS n 62 – WLC 296.145

VAN DEN HEEVER *Aquilian Damages in SA Law* 33 – WLC 296.149

VAN LEEUWEN *Roman-Dutch Law* 2 21 6 – WLC 296.55, WLC 296.101, WLC 296.143

VOET 8 3 8 – WLC 296.52, WLC 296.101

VOET 9 2 – WLC 296.148

***SA Railways & Harbours v Van Niekerk* 1960 Uys WLC 297 WC**

[WLC 297 NOTES]

Judgment Date 1960-03-23. **Court** WC (Eastern Cape). **Judge(s)** HHW De Villiers (Judge President ECD)

Also reported as *SAR & H v Van Niekerk* Vos 262

Quick-note

Water for industrial purposes – Application to abstract – Permit by Minister

Summary

The SAR & H. applied to the water court for permission to abstract water for industrial purposes. An objection to the

water court's jurisdiction was that the applicant had failed to obtain the Minister's permit as required by s 11(3).
Held: A water court may exercise jurisdiction without such a permit unless the water is to be used in a new industrial undertaking.

Sources Noted

1956 Act 54 s 1 "use for industrial purposes" – WLC 297.07
1956 Act 54 s 11(1) – WLC 297.08, WLC 297.09, WLC 297.13
1956 Act 54 s 11(2) – WLC 297.11
1956 Act 54 s 11(3) – WLC 297.03, WLC 297.04, WLC 297.05, WLC 297.06, WLC 297.13, WLC 297.14
1956 Act 54 s 11(5) – WLC 297.05
1956 Act 54 s 12(1) – WLC 297.04
1956 Act 54 s 12(5) – WLC 297.06, WLC 297.13, WLC 297.14

***SA Industrial Cellulose Corporation v Umkomaas Town Board* 1960 Uys WLC 298 WC**

[WLC 298 NOTES]

Judgment Date 1960-05-16. **Court** WC (Umkomaas). **Judge(s)** ES HENOCHSBERG

Also reported as *SA Industrial Cellulose Corporation v Umkomaas Town Board* Vos 264

Quick-note

Abstraction of water for industrial purposes – Public interest – Nuisance

Summary

The applicant applied to abstract 12 million gallons of water per day from the Umkomaas river for its wood pulp factory on the ground that its use would be in the public interest. Respondent opposed on the grounds that the water in the river was insufficient and that the effluent from applicant's works would constitute a nuisance due to its offensive smell and by poisoning the river into which it was released.

Held: On the evidence there was sufficient water to permit of the abstraction of 12 million gallons per day; and its use would be in the public interest, by creating jobs and stimulating the economy in the area.

Ordered: that the application be granted with certain conditions concerning the purification of the effluent.

Sources Noted

1919 Act 36 (Public Health) – WLC 298.25
1935 Act 21 (Sea Shore) – WLC 298.25
1956 Act 54 s 11(2) – WLC 298.20, WLC 298.33, WLC 298.38, WLC 298.43
1956 Act 54 s 12(5) – WLC 298.23
1956 Act 54 s 21 – WLC 298.40, WLC 298.41
1956 Act 54 s 21(1) – WLC 298.24, WLC 298.39
1956 Act 54 s 21(2) – WLC 298.24
1956 Act 54 s 21(5) – WLC 298.24
Bloemfontein Town Council v Richter 1938 AD 195 – WLC 298.52
SALMOND Torts ed 12 p 176 – WLC 298.52

***Senekal v Minister of Water Affairs* 1960 Uys WLC 299 WC**

[WLC 299 NOTES]

Judgment Date 1960-06-07. **Court** WC (Bloemfontein). **Judge(s)** JNC DE VILLIERS

Also reported as *Senekal v Minister van Waterwese* Vos 280

Quick-note

Expropriation – Compensation – Determined as on date of expropriation – Factors influencing

Summary

The value of property expropriated, is to be determined as on the date of the expropriation.

Factors influencing the determination, may be –

- (1) The fair market value of the land, namely what a willing buyer would pay a willing seller
- (2) An amount to compensate real inconvenience suffered, such as a farm being split by an expropriation in its centre
- (3) The value of mineral rights
- (4) Prices of farms sold in the area and their circumstances
- (5) The distance from the nearest town
- (6) The reasonable replacement costs of useful improvements
- (7) Interest on fencing of the remainder of the farm

But transfer duty paid on the acquisition of a new farm is not a loss occasioned by the expropriation.

Sources Noted

1912 Act 8 s 98(3)(a) – WLC 299.50
1912 Act 17 (Fencing) – WLC 299.54
1956 Act 54 s 40(a) – WLC 299.03, WLC 299.60
1956 Act 54 s 60(3) – WLC 299.03, WLC 299.60
Andrew Kiddie Pty Ltd v Valuation Court Kimberley 1956 4 SA 402 – WLC 299.09
Gass v Union Government 1956 WC (unreported) – WLC 299.52

Jackson v Union Government 1955 T (unreported) – WLC 299.52
Krause v SA Railways and Harbours 1948 4 SA 554 O – WLC 299.10
Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501 – WLC 299.27
Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501 – WLC 299.11
Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer Vizagapatam 1939 2 All ER 317 – WLC 299.12
Union Government v Gass 1959 Uys WLC 292 A – WLC 299.09, WLC 299.52, WLC 299.57
Union Government v Jackson 1956 Uys WLC 273 A – WLC 299.09, WLC 299.50, WLC 299.52
Union Government v Maile 1942 Uys WLC 205 A – WLC 299.27

***Blunt-Mackenzie v White River Valley Conservation Board* 1960 Uys WLC 300 WC**

[WLC 300 NOTES]

Judgment Date 1960-10-18. **Court** WC (Pretoria). **Judge(s)** CDJ THERON

Also reported as *Blunt-Mackenzie v White River Valley Conservation Board and Rankin (Pty) Ltd* Vos 292

Quick-note

Expropriation – Land let – Compensation between owner and tenant

Summary

The respondent Board gave notice of expropriation of applicant's property and offered compensation. Applicant objected that compensation also had to be offered to the tenant of the property.

Held, that the notice had to be given to the registered owner and not to the holder of other real rights in the land, since such rights were not being expropriated.

Sources Noted

1956 Act 54 s 1 "owner" – WLC 300.10, WLC 300.12, WLC 300.13
1956 Act 54 s 40 – WLC 300.04
1956 Act 54 s 60(2) – WLC 300.04, WLC 300.06, WLC 300.08, WLC 300.13
1956 Act 54 s 60(3) – WLC 300.04, WLC 300.15
1956 Act 54 s 60(4) – WLC 300.01, WLC 300.04
1956 Act 54 s 94 – WLC 300.04, WLC 300.07
1957 GN 135 r 17 (Water Court Rules) – WLC 300.01
1957 GN 135 r 45 (Water Court Rules) – WLC 300.01

***Burger v Pretoria Portland Cement Co Ltd (1)* 1961 Uys WLC 301 WC**

[WLC 301 NOTES]

Judgment Date 1961-03-29. **Court** WC (Robertson). **Judge(s)** AB BEYERS (Judge President, CPD)

Also reported as *Burger v Pretoria Portland Cement Co Ltd* Vos 295

Quick-note

Notice to oppose application to water court

Summary

A respondent who failed to file a plea in time, claimed the right to do so on the grounds that he had not been barred in terms of r 14(1) and that he had indicated his intention to oppose in a letter.

HELD: Regulation 14(1) applied only to a respondent who has filed a notice of intention to oppose.

HELD: Applicant was not prejudiced by giving further particulars.

Application for a postponement refused.

Sources Noted

1957 GN 135 Form 1 (Water Court Rules) – WLC 301.08, WLC 301.10
1957 GN 135 r 14(1) (Water Court Rules) – WLC 301.04, WLC 301.06, WLC 301.07, WLC 301.11, WLC 301.16
1957 GN 135 r 22(1) (Water Court Rules) – WLC 301.07, WLC 301.13
Ferro-Alloys Ltd v SA Native Trust 1958 1 SA 32 – WLC 301.07, WLC 301.13

***Vosloo, R v* 1961 Uys WLC 302 C**

[WLC 302 NOTES]

Judgment Date 1961-04-17. **Court** CPD. **Judge(s)** AB BEYERS (Judge President), AM DIEMONT

Also reported as *R v Vosloo* 1961 3 SA 273 C

Quick-note

Offence of demolishing a water furrow on his land – no servitude or rights of others proved

Summary

The owner of a farm (V) was found guilty of contravening s 170(1)(a) in that he covered and destroyed a water furrow on his farm. On appeal –

HELD: It was not proved that any person had a right or a servitude to this furrow on V's farm.

The court stated that it was undesirable for neighbours to settle disputes about water rights by using the criminal procedure of s 170. If they need elucidation about their rights over another's land, it should be sought in the civil courts or the water court.

Sources Noted

1956 Act 54 s 1 "irrigation work" – WLC 302.05
1956 Act 54 s 170 – WLC 302.15, WLC 302.16
1956 Act 54 s 170(1)(a) – WLC 302.01, WLC 302.08
Moelich v S 1961 C (UR) – WLC 302.15

***Burger v Pretoria Portland Cement Co Ltd (2)* 1961 Uys WLC 303 WC**

[WLC 303 NOTES]

Judgment Date 1961-04-20. **Court** WC (Robertson). **Judge(s)** AB BEYERS (Judge President)

Also reported as *Burger v Pretoria Portland Cement Co Ltd* Vos 299

Quick-note

Apportionment of water by 1874 order of court – original order missing – declaration of rights exercised for "time immemorial".

Summary

In 1874 the court of Landdrost & Heemraden of Swellendam apportioned the water of a stream equally between two riparian owners, but the original order of the court could not be found. One of the parties applied for a declaration of rights. This apportionment had since been adhered to by the owners and their successors

HELD: That the existing 50-50 arrangement be declared the lawful apportionment because –

- (1) If the origin of a long usage was unknown, it is assumed that such origin was lawful;
- (2) There was no objection to the application;
- (3) The water rights were previously sold without objection, there were registered subdivision agreements, and the sluices distributing the water 50-50 were regularly maintained and replaced.

Sources Noted

[No sources were noted in the judgment]

***O'Okiep Copper Co Ltd v Union Government* 1961 Uys WLC 304 WC**

[WLC 304 NOTES]

Judgment Date 1961-05-09. **Court** WC (Cape Town). **Judge(s)** HEP WATERMEYER

Also reported as *O'Okiep Copper Co Ltd and Springbok Municipality v Union Govt and Others* Vos 302

Quick-note

Abstracting water for industrial and urban use – Persons entitled to use public water – Public interest - Mining operations and urban requirements

Summary

A mine and a local authority applied to abstract and use water for mining and urban purposes respectively.

The mine had previously been granted permission to use public water from the Buffels river but the local authority had no right as such to the water from that stream.

HELD: That the mine conducted extended and profitable mining operations, generating many jobs; therefore the use of the water for purposes of its mining operations would be in the public interest.

HELD: that as the local authority wished to use the water for urban purposes and as its present supply was inadequate, the use of the water for purposes of the municipal supply would be in the public interest.

Held, further, that no abatement of rights under s 11(4) was necessary.

Sources Noted

1912 Act 8 s 20(1) – WLC 304.01
1934 Act 46 s 4 – WLC 304.01
1956 Act 54 s 11(2)(a) – WLC 304.13
1956 Act 54 s 11(2)(b)(i) – WLC 304.06, WLC 304.08, WLC 304.11, WLC 304.13, WLC 304.20
1956 Act 54 s 11(3) – WLC 304.07
1956 Act 54 s 11(4) – WLC 304.08, WLC 304.21
1956 Act 54 s 12(5) – WLC 304.07

***Benoni Town Council v Meyer (2)* 1961 Uys WLC 305 W**

[WLC 305 NOTES]

Judgment Date 1961-05-15. **Court** WPD. **Judge(s)** EL JANSEN.

Also reported as *Benoni Town Council v Meyer and Others* 1961 3 SA 316 W

Quick-note

Altering natural flow of rain water by filling up vlei – storm water will then inundate street – unlawful without servitude – interdict to prevent filling.

Summary

M started filling up a vlei on his land to reclaim the land for agricultural purposes. The B municipality got a temporary interdict to stop him – see *Benoni Town Council v Meyer (1)* 1959 Uys WLC 291 W (above) – on the ground that the water which would naturally have flowed into the vlei, would dam up and inundate a municipal street. B now applied for a final interdict.

HELD: An artificial discharge of rainwater onto the land of another without a servitude, is unlawful. M's land was subject to natural servitudes to receive rain water flowing down from the surrounding higher ground. By filling up the vlei, he blocked the natural flow of the water to his land, and infringed the right of the upper owner (B, as the owner of the street) to let its water flow down to M.

HELD: The Roads Ordinance, 1957, did not change the common law situation.

HELD: The interdict was granted to prevent M from further filling up his vlei. The court refused to order the removal of the few loads of rubble already dumped in the vlei, on the principle that the law does not concern itself with trifles.

Sources Noted

1957 TRANSVAAL Ord 22 s 42(1) (Roads) – WLC 305.19, WLC 305.23
1957 TRANSVAAL Ord 22 s 43 (Roads) – WLC 305.19
1957 TRANSVAAL Ord 22 s 46 (Roads) – WLC 305.19
1957 TRANSVAAL Ord 22 s 81 (Roads) – WLC 305.22
Benoni Town Council v Meyer (1) 1959 Uys WLC 291 W – WLC 305.29
Bingham v City Council of Johannesburg 1934 WLD 180 – WLC 305.30
Bishop v Humphries 1919 Uys WLC 63 W – WLC 305.07, WLC 305.10
Eastern & SA Telegraph Co v Cape Town Tramways 1902 AC 381 – WLC 305.30
Felner v Minister of the Interior 1954 4 SA 522 A – WLC 305.29
Germiston City Council v Chubb 1956 Uys WLC 275 A – WLC 305.15
Malherbe v Ceres Municipality 1951 4 SA 510 A – WLC 305.30
Mariam v Minister of the Interior 1959 1 SA 213 T – WLC 305.29
Naude v Bredenkamp 1956 2 SA 448 O – WLC 305.48
New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 305.10
Sedleigh-Denfield v O'Callaghan 1940 AC 880 HL – WLC 305.30
Town Council of Roodepoort-Maraiburg v Posse Property Pty Ltd 1932 WLD 78 – WLC 305.48
ALLEN *Legal Duties (Legal Morality and the Jus Abutendi)* – WLC 305.30
AMERICAN RESTATEMENT OF THE LAW *Torts* Vol 4 par 822+ – WLC 305.27, WLC 305.30
D 39 3 1 2 – WLC 305.05
D 39 3 1 13 – WLC 305.05
D 39 3 1 23 – WLC 305.07
D 39 3 2 – WLC 305.07
HALSBURY 3rd ed vol 28 par 169 – WLC 305.30
LAWSON FH *Negligence in the Civil Law* p 18 – WLC 30530
SALMOND *Jurisprudence* 9th ed p 697; 12th ed p 526 – WLC 305.44
SPENCER-BOWER *Res Judicata* p 91 – WLC 305.29
VOET 39 3 4 – WLC 305.27, WLC 305.31, WLC 305.34

***Venables v Minister of Water Affairs* 1961 Uys WLC 306 WC**

[WLC 306 NOTES]

Judgment Date 1961-11-17. **Case** 556. **Court** WC (Pretoria). **Judge(s)** JF LUDORF

Also reported as *Venables v Minister of Water Affairs* Vos 307

Quick-note

Expropriation of land – Compensation for movable structures – not an improvements on the land

Summary

Respondent hired certain 25 morgen of land from applicant and erected a structure thereon. Before the expiration of the lease, respondent expropriated the land. The question was whether the structure was an improvement for purposes of compensation.

HELD: Compensation could be claimed only if the structure was an “immovable”. The manner in which it was fixed to the land and the intention of the person erecting it, indicated that the structure was movable.

Sources Noted

1956 Act 54 s 60 – WLC 306.01, WLC 306.06
1956 Act 54 s 60(3)(a)(ii) – WLC 306.04

***Du Toit v Ackerman* 1962 Uys WLC 307 A**

[WLC 307 NOTES]

Judgment Date 1962-03-29. **Court AD.** **Judge(s)** LC STEYN (Chief Justice), DOK BEYERS, FHL RUMPF, DH BOTHA, AF WILLIAMSON (Judges of Appeal)

Also reported as *Du Toit v Ackerman* 1962 2 SA 581 A

Quick-note

Servitude of aqueduct – application to order registration – objection to jurisdiction of water court – dismissal of exception is appealable – 1956 Act 54 s 40(c), 41, 49(1), 151(1).

Summary

A applied to the water court to declare his right to water from a furrow over T's land, and to order a servitude of aqueduct to be registered.

T excepted that a water court has no jurisdiction concerning unregistered servitudes. The exception was dismissed and T appealed to the AD.

A objected that there was no appeal against the dismissal of an exception or against a costs order.

HELD: An appeal against the dismissal was lawful, but not against a costs order without the leave of the water court.

HELD: A water court has jurisdiction in respect of existing although unregistered rights of aqueduct.

Sources noted

1956 Act 54 s 35 – WLC 307.36

1956 Act 54 s 40 – WLC 307.30, WLC 307.38

1956 Act 54 s 40(c) – WLC 307.02, WLC 307.06, WLC 307.07, WLC 307.08, WLC 307.16, WLC 307.25, WLC 307.28, WLC 307.30

1956 Act 54 s 41 – WLC 307.18, WLC 307.19, WLC 307.38, WLC 307.40, WLC 307.41

1956 Act 54 s 41(1)(a)(iv) – WLC 307.38

1956 Act 54 s 41(1)(b)(i) – WLC 307.19, WLC 307.42

1956 Act 54 s 41(5) – WLC 307.17, WLC 307.35

1956 Act 54 s 43 – WLC 307.29, WLC 307.39

1956 Act 54 s 49(1) – WLC 307.05, WLC 307.17, WLC 307.36, WLC 307.40, WLC 307.42

1956 Act 54 s 49(2) – WLC 307.05, WLC 307.23

1956 Act 54 s 97(2) – WLC 307.27

1956 Act 54 s 151(1) – WLC 307.06, WLC 307.07, WLC 307.08, WLC 307.25

1959 Act 59 s 20(2)(b) (Supreme Court) – WLC 307.23

Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance) 1915 AD 599 – WLC 307.12, WLC 307.14

Erasmus v Daly & Co 1912 TPD 465 – WLC 307.23

Myburgh Krone & Co Ltd, Liquidators v Standard Bank of SA Ltd 1924 AD 226 – WLC 307.14

Steyler v Fitzgerald 1911 AD 295 – WLC 307.11, WLC 307.13, WLC 307.14

Warner v Reid 1907 T 306 – WLC 307.23

***Becker, S v* 1962 Uys WLC 308 NC**

[WLC 308 NOTES]

Judgment Date 1962-05-04. **Court** GWLD [Kimberley, Northern Cape]. **Judge(s)** HJ POTGIETER, GFdeV HUGO

Also reported as *S v Becker* 1963 1 SA 442 NC; Vos 309

Quick-note

Water unlawfully diverted – State to prove wrongful intention

Summary

Water was diverted from a government furrow to the land of B, who was charged in the magistrates' court with contravening s 15(b) of the Vaal River Development Scheme Act 38 of 1934, by which "any person who without right or lawful authority interferes with or alters the flow of water in the works, or within the limit of the works, or interferes with the lawful distribution of such water, or uses such water in a manner not authorised by or under this Act", commits an offence.

B's defence was that he did not know that the water was being diverted to his land. He was nevertheless found guilty.

On appeal

HELD: The State failed to prove –

(1) That the water was within an area defined by the Act, and

(2) That B had the necessary intention (*mens rea*) to commit the crime.

The conviction and sentence was therefore set aside.

Sources Noted

1912 Act 8 s 133(1)(b) – WLC 308.10

1917 Act 31 s 127(2)(b) (Criminal Procedure) – WLC 308.07, WLC 308.08

1934 Act 38 s 1 'the works' (Vaal River Development Scheme) – WLC 308.07

1934 Act 38 s 15(b) (Vaal River Development Scheme) – WLC 308.01, WLC 308.03, WLC 308.05

1934 Act 38 Sched 1 (Vaal River Development Scheme) – WLC 308.04, WLC 308.05

1943 Act 33 s 15(1) (Rents) – WLC 308.07

1955 Act 56 s 315(2)(b) (Criminal Procedure) – WLC 308.07, WLC 308.08

Beebee, R v 1944 AD 333 – WLC 308.07

Bosman, R v 1936 CPD 284 – WLC 308.10

***Cronje v Minister of Water Affairs* 1962 Uys WLC 309 WC**

[WLC 309 NOTES]

Judgment Date 1962-08-07. **Court** WC (Pietermaritzburg). **Judge(s)** AB HARCOURT

Also reported as *Cronje v Minister of Water Affairs* Vos 312

Quick-note

Costs of witness in expropriation compensation proceeding – 1956 Act 54 s 38(2)

Summary

Qualifying fees are only payable to an expert witness. An auctioneer and estate agent is not an expert. The court has a discretion in allowing qualifying fees and, as the witness did not qualify himself to give evidence but based his evidence upon actual knowledge of the locality gained or on his previous visits to the spot, the court disallowed qualifying fees.

A witness may be paid a fee in excess of an ordinary witness fee but such is not recoverable.

Qualifying fees are recoverable only under a special order.

Costs is a matter for the decision of the water court judge only, without the assessors.

Sources noted

1956 Act 54 s 38(2) – WLC 309.06

1956 Act 54 s 50(2) – WLC 309.07

1956 Act 54 s 60 – WLC 309.01, WLC 309.16

1956 Act 54 s 60(4)bis – WLC 309.07

1957 GN 135 r 31(4) (Water Court Rules) – WLC 309.14

1961 Act 56 s 10 (Water Amendment) – WLC 309.07

Government v Oceana Consolidated Co 1908 TS 43 – WLC 309.10

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 – WLC 309.10

Wocke v Williams 1922 TPD 78 – WLC 309.12

ROOS *Taxation of Bills of Costs in the Supreme Courts of South Africa* 84+ – WLC 309.10, WLC 309.11

***Urquhart v Minister of Water Affairs* 1962 Uys WLC 310 WC**

[WLC 310 NOTES]

Judgment Date 1962-12-12. **Court** WC (Pietermaritzburg). **Judge(s)** PJ WESSELS

Also reported as *Urquhart v Minister of Water Affairs* Vos 315

Quick-note

Compensation for expropriation – likely loss – actual inconvenience – refused offer lapses

Summary

If the Minister's offer of compensation for the actual or likely loss or inconvenience caused by the expropriation is refused, it lapses.

The loss or inconvenience is that caused at the time of the expropriation and that which is likely to be caused in the future. The court is to make separate determinations in respect of each.

The inconvenience must be real and not merely fanciful or illusory.

The word 'loss' includes loss of a non-capital nature. Expenditure incurred is not necessarily a loss.

'Inconvenience' is like pain and suffering associated with bodily injury. It cannot readily be stated in terms of money.

Inconvenience suffered in other cases of expropriation are not always helpful.

The Act does not give scope for a generous policy.

Sources Noted

1912 Act 12 s 11 (Land Settlement) – WLC 310.03

1956 Act 54 s 60 – WLC 310.52

1956 Act 54 s 60(2) – WLC 310.21, WLC 310.33, WLC 310.51

1956 Act 54 s 60(3) – WLC 310.32

1956 Act 54 s 60(3)(a) – WLC 310.01, WLC 310.19, WLC 310.21, WLC 310.54

1956 Act 54 s 60(4)(a) – WLC 310.23, WLC 310.31, WLC 310.52, WLC 310.53, WLC 310.55

1957 GN 135 r 8 (Water Court Rules) – WLC 310.56

Union Government v Gass 1959 Uys WLC 292 A – WLC 310.36

***Vlakplaats Estates Pty Ltd v Geral* 1963 Uys WLC 311 T**

[WLC 311 NOTES]

Judgment Date 1963-04-11. **Court** TPD. **Judge(s)** J DE VOS (Acting Judge)

Also reported as *Vlakplaats Estates (Pty) Ltd v Geral* 1963 3 SA 31 T

Quick-note

Draining water from a dam – interdict – rights under registered servitude in dispute – jurisdiction – Joinder of parties

Summary

V applied for an interdict restraining G (the lessee of the adjoining farm) from draining more water from a dam than the quantity to which that farm has in terms of servitude in favour of V's farm.

G objected that it was a dispute as to water rights and that only the water court has jurisdiction; also that the owner of the farm should be joined as a party

HELD: As V claimed the enforcement of a servitude, the Water Act 1956 was not applicable and that the TPD has jurisdiction.

HELD: The owner of farm and all other owners who have rights to the water in the dam have to be joined as respondent because their rights and duties have to be determined.

Sources Noted

1956 Act 54 s 5 – WLC 311.06, WLC 311.07, WLC 311.08

1956 Act 54 s 40(a)(ii) – WLC 311.06

1956 Act 54 s 43 – WLC 311.06

Amalgamated Engineering Union v Minister of Labour 1949 3 SA 637 A – WLC 311.18, WLC 311.22, WLC 311.23

Paarl Pretoria Gold Mining Co v Donovan & Langlaagte Royal Gold Mining Co 1889-90 T (3 SAR) 56 – WLC 311.23

VOET 44 2 5 – WLC 311.23

***Van Schalkwyk v Van der Wath* 1963 Uys WLC 312 A**

[WLC 312 NOTES]

Judgment Date 1963-05-27. **Court** AD. **Judge(s)** LC STEYN (Chief Justice), PJ VAN BLERK, DH BOTHA, GN HOLMES, PJ WESSELS (Judges of Appeal)

Also reported as *Van Schalkwyk v Van der Wath* 1963 3 SA 636 A

Quick-note

Rain water overflowing onto neighbour's property – interdict and damages

Summary

S claimed damages caused to his farm by rain water from W's farm.

The court a quo allowed the claim, finding that the contour dykes on defendant's farm had concentrated the water so much that it caused the erosion on plaintiff's farm. On appeal –

HELD: A plaintiff must prove that works on the upper farm caused the damage by alteration of the water's natural flow.

The plaintiff must comply with the requirements of the law concerning the release of rain water to a lower property (the action *aquae pluviae arcendae*). He must prove that the upper owner's works resulted in the water flowing on to the lower owner's land. The position must therefore be compared to the original natural flow of the water.

HELD, on the facts, that the contour dykes did not cause the alleged water damage and that any heavy rains would have caused such damage. It therefore reversed the court a quo's decision.

Sources Noted

De Villiers v Galloway 1943 Uys WLC 207 A – WLC 312.16

Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 – WLC 312.18

Johannesburg Municipality v Jolly 1915 TPD 429 – WLC 312.20

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 312.20

Regal v African Superslate (Pty) Ltd 1963 1 SA 102 A – WLC 312.18

VAN DEN SANDE *Dec Fris* 5 5 1 – WLC 312.17

VOET 39 3 2 – WLC 312.16

VOET 39 3 4 – WLC 312.18

***Kitchener v SA Native Trust* 1963 Uys WLC 313 WC**

[WLC 313 NOTES]

Judgment Date 1963-07-05. **Court** WC (Pretoria). **Case** 574, 575, 576. **Judge(s)** O GALGUT

Also reported as *Kitchener and Others v SA Native Trust* Vos 345

Quick-note

Expropriation – compensation – Principles of valuation – Interest on compensation not claimable – solatium

Summary

In an application for compensation for farms which had been expropriated, HELD –

(1) The properties are to be considered as if they could have been subdivided and the subdivided portions sold.

(2) interest on compensation cannot be recovered.

(3) no loss or inconvenience was proved

(4) In the circumstances the maximum *solatium* of 20% should be awarded.

(5) The principles for deciding the value to be placed on expropriated property are –

(5.1) The value is the general selling price in the area among people who deal in that commodity.

(5.2) In the absence of power to ascertain the value by an actual sale, it is realised that only approximate results can be expected.

- (5.3) Due weight must be given to all the circumstances which would be likely to operate in the minds of intending purchasers.
- (5.4) Increases accruing to the value of the land by reason of its potential or possibilities, must be considered without indulging in feats of imagination.
- (5.5) The amount is to be fixed on the basis of what a willing seller can expect to receive from a willing buyer. The fact that the seller does not wish to sell or that the buyer is in urgent need to acquire should be ignored.
- (5.6) The court or the arbitrator must endeavour to fix the amount a willing buyer would pay having regard to the potentialities of the land as if there were a number of interested buyers even though the expropriator is the only possible purchaser of the ground.

Sources Noted

1912 Act 8 s 98(3) – WLC 313.51, WLC 313.52
 1936 Act 18 s 13 (Native Trust and Land) – WLC 313.02, WLC 313.04, WLC 313.06, WLC 313.50, WLC 313.51, WLC 313.53, WLC 313.63
 1936 Act 18 s 15 (Native Trust and Land) – WLC 313.18
 1956 Act 54 s 60 – WLC 313.50
 1961 Act 56 s 10(b) (Water Amendment) – WLC 313.50
Pietermaritzburg Corporation v SA Breweries 1911 AD 501 – WLC 313.30
SA Railways v New Silverton Estate Ltd 1946 AD 830 WLC 313.30
SA Railways v Theron 1917 TPD 67 – WLC 313.30, WLC 313.36, WLC 313.44
Sri Rajah Vyricherla Naryana Cajapatiraju v Revenue Divisional Officer Vizagapatam 1939 2 All ER 317 WLC 313.30
Union Government v Jackson 1956 Uys WLC 273 A – WLC 313.52, WLC 313.59
Union Government v Maile 1942 Uys WLC 205 A – WLC 313.55

***Human v Lourens* 1963 Uys WLC 314 WC**

[WLC 314 NOTES]

Judgment Date 1963-07-30. **Court** WC (Cape Town). **Judge(s)** ME THERON

Also reported as *Human en Human v Lourens* Vos 356

Quick-note

Subterranean water is private water – water court has no jurisdiction

Summary

H applied to interdict L from using the water of a borehole, well and drainage furrow. L pleaded that the water court has no jurisdiction

HELD: A water court has only jurisdiction conferred on it by the Act. That subterranean water is private water and a water court has no jurisdiction concerning rights to private water (except rights acquired by prescription ito s 5)

Sources Noted

1956 Act 54 Chapter 3 – WLC 314.20
 1956 Act 54 s 5 – WLC 314.16
 1956 Act 54 s 27 – WLC 314.10
 1956 Act 54 s 28 – WLC 314.19
 1956 Act 54 s 40(a) – WLC 314.11, WLC 314.17, WLC 314.18, WLC 314.19, WLC 314.20, WLC 314.21, WLC 314.22, WLC 314.23, WLC 314.25
 1956 Act 54 s 40(c) – WLC 314.11, WLC 314.19, WLC 314.20, WLC 314.24, WLC 314.25

***Minister of Water Affairs v Mostert (1)* 1964 Uys WLC 315 A**

[WLC 315 NOTES]

Judgment Date 1964-03-25. **Court** AD. **Judge(s)** LC STEYN (Chief Justice), PJ VAN BLERK, DH BOTHA, GN HOLMES, JT VAN WYK (Judges of Appeal)

Also reported as *Minister van Waterwese v Mostert en Andere* 1964 2 SA 656 A

Quick-note

Expropriation – Compensation to ‘owner’ – proceedings of water court

Summary

The Minister expropriated M’s 3 farms, 2 of which were let under registered long leases. The owner and the tenant applied to the water court for compensation, the tenant’s claim being for loss of profits, unripened crops and the value of improvements.

The Minister excepted to the tenant’s claim as disclosing no cause of action because s 60(2) provides only for compensation to the “owner”.

HELD: Section 60 provides not only for the expropriation of land but also of rights in land. Whereas the government wanted to occupy the properties immediately, the tenant’s rights were also expropriated for which they have to be compensated.

The court expressed the opinion that a water court’s proceedings were informal, and that formal proceedings such as exceptions and applications to strike out, should not be used.

Sources Noted

1956 Act 54 s 60 – WLC 315.02, WLC 315.04, WLC 315.06, WLC 315.08, WLC 315.15, WLC 315.25

1956 Act 54 s 60(1) – WLC 315.21
 1956 Act 54 s 60(2) – WLC 315.02, WLC 315.07, WLC 315.11, WLC 315.18, WLC 315.21, WLC 315.23, WLC 315.25
 1956 Act 54 s 60(3) – WLC 315.12, WLC 315.19, WLC 315.20, WLC 315.21, WLC 315.22, WLC 315.29
 1956 Act 54 s 60(4) – WLC 315.03, WLC 315.14, WLC 315.21, WLC 315.22
 1956 Act 54 s 60(6) – WLC 315.02, WLC 315.23, WLC 315.24, WLC 315.25
 1957 Act 75 s 1 (Water Amendment) – WLC 315.02
 1961 Act 56 s 10 (Water Amendment) – WLC 315.02
Blackmore v Moodies GM & Exploration Co Ltd 1917 AD 402 – WLC 315.15
Blunt-Mackenzie v White River Valley Conservation Board 1960 Uys WLC 300 WC – WLC 315.26
Garlick v Smartt (1) 1927 Uys WLC 129 A – WLC 315.33
STEYN Uitleg van Wette ed 3 p 98 – WLC 315.15

***SA Native Trust v Kitchener* 1964 Uys WLC 316 A**

[WLC 316 NOTES]

Judgment Date 1964-05-18. **Court** AD. **Judge(s)** LC STEN (Chief Justice), NO THOMPSON, FHL RUMPF, DH BOTHA, PJ WESSELS (Judges of Appeal)

Also reported as *Die Suid-Afrikaanse Naturelletrust v Kitchener en Andere* 1964 3 SA 417 A

Quick-note

Expropriation – Compensation – ‘Exceptional circumstances’

Summary

The Trust expropriated K’s land. The quantity of compensation for the land and improvements was determined by the water court, which added 20% of the values in terms of s 13(5) of Act 18 of 1936. The Trust appealed against the judgment, inter alia against the addition of this percentage.

HELD: The proviso to s 13(5) which states that the water court is to add 20% to the compensation if “justified by the special circumstances of the case”, implies that really exceptional circumstances, peculiar to the case, are to be proved.

Several circumstances were advanced, but the court of appeal found none of them exceptional.

HELD: Interest was not payable unless the expropriated person had to vacate the land and there was a delay with the payment of the compensation.

Sources Noted

1912 Act 8 s 98 – WLC 316.54
 1912 Act 8 s 98(3) – WLC 316.11, WLC 316.12, WLC 316.14
 1934 Act 46 s 9 (Irrigation Amendment) – WLC 316.11
 1936 Act 18 s 13 (Native Trust and Land) – WLC 316.01, WLC 316.03, WLC 316.06, WLC 316.10, WLC 316.12, WLC 316.13, WLC 316.10, WLC 316.14, WLC 316.16, WLC 316.52, WLC 316.54
 1956 Act 54 s 49 – WLC 316.01
 1956 Act 54 s 60(3) – WLC 316.27
 1956 Act 54 s 60(4)bis – WLC 316.27
Union Government v Maile 1942 Uys WLC 205 A – WLC 316.12
Union Government v Jackson 1956 Uys WLC 273 A – WLC 316.12, WLC 316.28, WLC 316.54

***Beckenstrater v Sand River Irrigation Board (1)* 1964 Uys WLC 317 T**

[WLC 317 NOTES]

Judgment Date 1964-09-11. **Court** TPD. **Judge(s)**. WG TROLLIP

Also reported as *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 T

Quick-note

Irrigation board – may expropriate servitude and waterworks – use of water on unscheduled land

Summary

B applied for an order declaring a notice of expropriation invalid for the reasons that the Minister’s consent was not properly obtained, and that the board could only expropriate existing servitudes.

HELD: The Minister has to exercise general control or supervision over expropriations by irrigation boards. He has to apply his mind to the proposed expropriation but his consent can be in general terms.

HELD: The word ‘servitude’ in s 94 includes a praedial and a personal servitude; a board may expropriate and extinguish an existing servitude or create in its place a new personal servitude in favour of the Board; the servitude must be for some authorised purpose, and the board therefore has the power to expropriate a servitude for the construction and use of waterworks.

Sources Noted

1912 Act 8 s 2 ‘irrigation work’ – WLC 317.64
 1912 Act 8 s 17 – WLC 317.63, WLC 317.64
 1912 Act 8 s 98 – WLC 317.69
 1912 Act 8 s 99 – WLC 317.69
 1912 Act 8 s 100 – WLC 317.69
 1934 Act 46 s 9 (Irrigation Amendment) – WLC 317.69

1956 Act 54 Chapter 8 – WLC 317.08, WLC 317.42, WLC 317.43
 1956 Act 54 s 1 “waterwork” – WLC 317.65, WLC 317.70
 1956 Act 54 s 13 – WLC 317.28
 1956 Act 54 s 56(4) – WLC 317.66
 1956 Act 54 s 60 – WLC 317.03, WLC 317.25, WLC 317.28, WLC 317.69
 1956 Act 54 s 60(1) – WLC 317.36, WLC 317.50
 1956 Act 54 s 60(3) – WLC 317.54
 1956 Act 54 s 60(9) – WLC 317.36, WLC 317.37
 1956 Act 54 s 71 – WLC 317.59
 1956 Act 54 s 72 – WLC 317.59
 1956 Act 54 s 73 – WLC 317.59
 1956 Act 54 s 74 – WLC 317.59
 1956 Act 54 s 78 – WLC 317.74
 1956 Act 54 s 79(2) – WLC 317.15
 1956 Act 54 s 88(1) – WLC 317.81
 1956 Act 54 s 89 – WLC 317.78, WLC 317.84
 1956 Act 54 s 89(1) – WLC 317.61, WLC 317.62, WLC 317.77, WLC 317.82
 1956 Act 54 s 89(2) – WLC 317.15
 1956 Act 54 s 89(4) – WLC 317.79, WLC 317.80
 1956 Act 54 s 89(5) – WLC 317.15, WLC 317.80
 1956 Act 54 s 89(7) – WLC 317.15, WLC 317.82
 1956 Act 54 s 93 – WLC 317.75
 1956 Act 54 s 94 – WLC 317.03, WLC 317.04, WLC 317.08, WLC 317.09, WLC 317.37, WLC 317.39, WLC 317.41, WLC 317.42, WLC 317.43, WLC 317.69, WLC 317.84
 1956 Act 54 s 94(1) – WLC 317.11, WLC 317.12, WLC 317.14, WLC 317.15, WLC 317.19, WLC 317.33, WLC 317.34, WLC 317.35, WLC 317.37, WLC 317.50, WLC 317.51, WLC 317.78, WLC 317.85
 1956 Act 54 s 94(2) – WLC 317.37
 1956 Act 54 s 95 – WLC 317.15
 1956 Act 54 s 100 – WLC 317.70, WLC 317.75, WLC 317.76, WLC 317.77
 1956 Act 54 s 105(1) – WLC 317.59
 1956 Act 54 s 110(1) – WLC 317.28, WLC 317.38, WLC 317.83
 1956 Act 54 s 112 – WLC 317.39, WLC 317.50
 1956 Act 54 s 139 – WLC 317.03, WLC 317.29
 1956 Act 54 s 140 – WLC 317.28
 1956 Act 54 s 140(2) – WLC 317.50
 1956 Act 54 s 141(1) – WLC 317.28, WLC 317.29, WLC 317.42, WLC 317.50
 1956 Act 54 s 142 – WLC 317.03, WLC 317.36
 1956 Act 54 s 145(1) – WLC 317.36
 1956 Act 54 s 146(2) – WLC 317.36
 1956 Act 54 s 151(1) – WLC 317.37
 1956 Act 54 s 151(2) – WLC 317.36
 1956 Act 54 s 157 bis – WLC 317.41
 1956 Act 54 s 162 bis – WLC 317.41
 1963 Act 63 s 3 (Water Amendment) – WLC 317.41
 1963 Act 63 s 4 (Water Amendment) – WLC 317.41
Ahlbom v Vickers 1891-2 C (9 SC) 484 – WLC 317.46
Brunsdon’s Estate v Brunsdon’s Estate 1920 CPD 159 – WLC 317.72, WLC 317.73, WLC 317.74
City Deep v McCalgan 1924 WLD 276 – WLC 317.30
Dreyer v Ireland 1874 C (4 Buch) 193 – WLC 317.28
Engelbrecht v Brits 1906 T 274 – WLC 317.48
Erasmus v Union Government 1952 Uys WLC 256 O – WLC 317.40
Kent v SAR & H 1946 AD 398 – WLC 317.14, WLC 317.25, WLC 317.32
Louw v de Villiers 1893 C (10 SC) 324 – WLC 317.48
Minister of Defence v Commercial Properties Ltd 1955 3 SA 324 N – WLC 317.24
Minister of Irrigation re Vlekpoort River 1948 Uys WLC 228 C – WLC 317.26, WLC 317.63
Minister of Water Affairs v Mostert (1) 1964 Uys WLC 315 A – WLC 317.25, WLC 317.32
Municipality of Potchefstroom v Cameron 1877-81 T (Kotze) 206 – WLC 317.72
Rabie v de Wit 1946 CPD 346 – WLC 317.48
SA Railways v Registrar of Deeds Natal 1919 NPD 66 – WLC 317.25, WLC 317.32
Sebastian v Malelane Irrigation Board (1) 1950 Uys WLC 240 T – WLC 317.60
Stellenbosch Divisional Council v Shapiro 1953 3 SA 418 C – WLC 317.25, WLC 317.32
Tyler v Ferris 1906 1 KB 94 – WLC 317.18
Union Government Minister of Justice v Bolam 1927 Uys WLC 126 A – WLC 317.63, WLC 317.67, WLC 317.68, WLC 317.69, WLC 317.76
Willoughby’s Consolidated Co Ltd v Cophall Stores Ltd 1913 AD 267 – WLC 317.27
White River Village Council v HL Hall & Sons Ltd 1958 2 SA 524 A – WLC 317.57
 HALSBURY 10 p 26 – WLC 317.57
 LEE & HONORE Property par 147 – WLC 317.73
 VOET 8 1 1 – WLC 317.26, WLC 317.30
 VOET 8 1 2 – WLC 317.30
 VOET 8 1 4 – WLC 317.27, WLC 317.28
 VOET 8 1 5 – WLC 317.49
 VOET 8 3 12 – WLC 317.46, WLC 317.49
 VOET 8 4 7 – WLC 317.48
 VOET 8 4 8 – WLC 317.30
 VOET 8 4 13 – WLC 317.48
 VOET 8 4 14 – WLC 317.72
 VOET 8 4 16 – WLC 317.46

***Ohrigstad Irrigation Board v Slabbert* 1965 Uys WLC 318 WC**

[WLC 318 NOTES]

Judgment Date 1965-02-22. **Court** WC (Pretoria). **Judge(s)** MR DE KOCK

Also reported as *Ohrigstad Besproeiingsraad v Slabbert* Vos 361

Quick-note

Irrigation board – power to reduce members’ water rights

Summary

During a drought the irrigation board for the area reduced riparian owners’ extraction rights and applied for an order confirming such reduction. S objected that the board was not empowered to reduce his right to extract during 6 days of the week (a right which he alleged to have acquired by prescription).

HELD: A right to extract on certain days and times can be acquired by prescription. The Act protects existing rights.

Therefore the board had no power to reduce such a right.

Sources Noted

1912 Act 8 s 9 – WLC 318.20

1943 Act 18 s 2 “*acquisitive prescription*” (Prescription) – WLC 318.17

1956 Act 54 s 4(1) – WLC 318.08, WLC 318.12

1956 Act 54 s 6 – WLC 318.20

1956 Act 54 s 6(1) – WLC 318.17, WLC 318.18

1956 Act 54 47(3) – WLC 318.26

1956 Act 54 s 89(1) – WLC 318.03, WLC 318.08, WLC 318.12

Ellis v Laubscher 1956 Uys WLC 276 A – WLC 318.20

Harty v Douglas 1930 Uys WLC 157 WC – WLC 318.19

Taute v Allers 1935 Uys WLC 184 WC – WLC 318.19

Van der Westhuizen v Rabe 1915 Uys WLC 33 WC – WLC 318.19

***Minister of Water Affairs v Mostert (2)* 1966 Uys WLC 319 A**

[WLC 319 NOTES]

Judgment Date 1966-09-01. **Court** AD. **Judge(s)** DOK BEYERS (Acting Chief Justice), PJ VAN BLERK, FHL RUMPFF, PJ WESSELS, HJ POTGIETER (Judges of Appeal)

Also reported as *Minister of Water Affairs v Mostert and Others* 1966 4 SA 690 A

Quick-note

Expropriation of partly irrigable land – “improvements” distinguished from work to improve the land – sugar quota cannot be expropriated – mitigation of damages

Summary

The Minister expropriated M’s 3 farms for the purposes of constructing the Pongolapoort dam. M applied to the water court to determine the amount of compensation. Two of the farms were let. Sugar and other crops were grown on the farms.

The water court granted compensation to M on the basis of its valuation of the land (consisting of different types and prepared for different crops), housing, dams, roads, standing crops, cane ratoons; and loss and inconvenience in respect of the sale of movables, relocation, and loss of rentals (of the 2 farms let by M).

The court also awarded compensation to the two tenants, being the value of the unexpired portions of the leases.

The parties appealed and cross-appealed against certain valuations. The AD dealt with these items in detail and changed some of them.

“Improvements” in s 60(3)(a) means constructions of a relatively permanent nature with the intention that it should adhere to the land. It includes plant material which is to produce successive crops.

A sugar quota under the Sugar Industry Agreement cannot be expropriated according to s 60.

The principle of mitigation of damages also applies to expropriation: the person expropriated should take reasonable steps to mitigate his loss.

Sources Noted

1912 Act 8 s 98 – WLC 319.16, WLC 319.21, WLC 319.24

1912 Act 8 s 98(1) – WLC 319.22, WLC 319.24, WLC 319.26, WLC 319.27

1912 Act 8 s 98(2) – WLC 319.26

1934 Act 46 s 9 (Irrigation Amendment) – WLC 319.16

1912 Act 12 (Land Settlement) – WLC 319.02

1937 Act 47 s 40 (Deeds Registries) – WLC 319.07

1937 Act 47 s 43 (Deeds Registries) – WLC 319.07

1956 Act 54 s 1 “*government water work*” – WLC 319.20

1956 Act 54 s 4(1) – WLC 319.35

1956 Act 54 s 59(1) – WLC 319.16, WLC 319.17, WLC 319.19, WLC 319.23, WLC 319.24, WLC 319.25, WLC 319.26, WLC 319.27, WLC 319.34, WLC 319.37, WLC 319.40, WLC 319.43, WLC 319.45, WLC 319.47, WLC 319.48, WLC 319.49
 1956 Act 54 s 59(2) – WLC 319.18
 1956 Act 54 s 59(3) – WLC 319.16, WLC 319.24, WLC 319.26
 1956 Act 54 s 60 – WLC 319.39, WLC 319.53, WLC 319.102, WLC 319.169
 1956 Act 54 s 60(1) – WLC 319.47, WLC 319.48, WLC 319.51, WLC 319.180
 1956 Act 54 s 60(2) – WLC 319.50, WLC 319.168
 1956 Act 54 s 60(3) – WLC 319.52, WLC 319.55, WLC 319.56, WLC 319.60, WLC 319.61, WLC 319.66, WLC 319.68, WLC 319.72, WLC 319.73, WLC 319.74, WLC 319.75, WLC 319.77, WLC 319.82, WLC 319.83, WLC 319.84, WLC 319.85, WLC 319.87, WLC 319.88, WLC 319.89, WLC 319.92, WLC 319.96, WLC 319.106, WLC 319.110, WLC 319.114, WLC 319.136, WLC 319.138, WLC 319.145, WLC 319.158, WLC 319.164, WLC 319.168, WLC 319.180, WLC 319.183, WLC 319.188, WLC 319.189, WLC 319.190, WLC 319.191, WLC 319.201, WLC 319.211, WLC 319.213, WLC 319.216, WLC 319.223
 1956 Act 54 s 60(4) – WLC 319.01, WLC 319.30, WLC 319.51
 1961 Act 56 s 62 – WLC 319.34, WLC 319.35, WLC 319.36, WLC 319.37, WLC 319.40, WLC 319.43, WLC 319.46, WLC 319.48, WLC 319.49
 1956 Act 54 s 62(1) – WLC 319.28, WLC 319.40
 1956 Act 54 s 62(2) – WLC 319.28
 1956 Act 54 s 62(4) – WLC 319.46
 1956 Act 54 s 62(5) – WLC 319.46
 1956 Act 54 s 63 – WLC 319.42, WLC 319.43, WLC 319.48
 1956 Act 54 s 63(1) – WLC 319.41
 1957 GN 135 r 8(2)(a) (Water Court Rules) – WLC 319.225
 1961 Act 56 s 9 (Water Amendment) – WLC 319.19
Botha v Soocher 1941 TPD 245 – WLC 319.177
Durban Corporation v Lincoln 1940 AD 36 – WLC 319.88
Hazis v Transvaal and Delagoa Bay Investment Co Ltd 1939 AD 374 – WLC 319.197
Illovo Sugar Estates Ltd v SAR & H 1947 1 SA 58 N – WLC 319.121
Minister of Water Affairs v Mostert (1) 1964 Uys WLC 315 A – WLC 319.54, WLC 319.66, WLC 319.213
Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501 – WLC 319.124
Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd 1965 1 SA 897 A – WLC 319.100
Stevens v Van Rensburg 1948 4 SA 779 T – WLC 319.175
Union Government v Jackson 1956 Uys WLC 273 A – WLC 319.77, WLC 319.133
Union Government v Maile 1942 Uys WLC 205 A – WLC 319.63
Zandberg v Van Zyl 1910 AD 302 – WLC 319.170, WLC 319.173
 CRIPPS *Compulsory Acquisition of Land* ed 11 4-179 – WLC 319.31

***Le Roux v Le Roux* 1966 Uys WLC 320 A**

[WLC 320 NOTES]

Judgment Date 1966-11-17. **Court AD.** **Judge(s)** DOK BEYERS, FHL RUMPF, DH BOTHA, AF WILLIAMSON (Judges of Appeal), WG TROLLIP (Acting Judge of Appeal)

Also reported as *Le Roux en 'n Ander v Le Roux* 1967 1 SA 446 A

Quick-note

Application to apportion superfluous water in river – former apportionment still in force – principle of res judicata applied

Summary

A water court apportioned the normal flow of the K river between 6 riparian farms below a storage dam in the river. A few years later the court also determined the method of distribution. In 1962 some of the owners applied to the court for a re-apportionment, alleging that there was superfluous water in the dam available to them. The other owners (whose farms were part of the former orders of the court) put up the defence of res judicata.

The water court upheld the defence, and the AD dismissed the appeal.

Sources Noted

1906 BRITAIN c 58 Workmen's Compensation Act – WLC 320.47, WLC 320.50
 1912 Act 8 s 10(4) – WLC 320.40
 1912 Act 8 s 12 – WLC 320.40
 1912 Act 8 s 32(b) – WLC 320.06, WLC 320.35, WLC 320.39
 1950 Act 43 s 21(1) (Rents) – WLC 320.47, WLC 320.49
 1956 Act 54 s 6(1) – WLC 320.23
 1956 Act 54 s 9 – WLC 320.23
 1956 Act 54 s 9(1)(e) – WLC 320.40
 1956 Act 54 s 40(b) – WLC 320.35, WLC 320.42, WLC 320.44, WLC 320.52
 1956 Act 54 42(1) – WLC 320.44
 1956 Act 54 49(1) – WLC 320.44
 1956 Act 54 50(1) – WLC 320.44
 1956 Act 54 51(1) – WLC 320.44, WLC 320.45
 1956 Act 54 s 52(3) – WLC 320.23
 1956 Act 54 s 170(1)(e) – WLC 320.23
 1956 Act 54 s 181(2) – WLC 320.44
African Farms and Townships Ltd v Cape Town Municipality 1963 2 SA 555 A – WLC 320.34, WLC 320.41
Bertram v Wood 1893 C (10 SC) 177 – WLC 320.41
Burman v Woods 1948 1 KB 111 – WLC 320.47
De Villiers v Barnard 1958 Uys WLC 285 A – WLC 320.23

Klein Berg River (2) 1919 Uys WLC 65 WC – WLC 320.42
Lawson and Kirk (Pty) Ltd v Phil Morkel Ltd 1953 3 SA 324 A – WLC 320.47
Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 320.42
Radcliffe v Pacific Steam Navigation Co 1910 1 KB 685 – WLC 320.47, WLC 320.50
Smartt Syndicate Ltd v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 320.40
Smartt Syndicate Ltd v Richmond Municipality (1) 1919 Uys WLC 67 WC – WLC 320.23
D 50 17 57 – WLC 320.41
SPENCER BOWER *Res Judicata* 149-50 p 96-7 – WLC 320.51

***De Beers Consolidated Mines Ltd re Buffels River* 1967 Uys WLC 321 WC**

[WLC 321 NOTES]

Judgment Date 1967-05-02. **Court** WC (Cape Town). **Judge(s)** HEP WATERMEYER

Also reported as *De Beers Consolidated Mines Ltd* Vos 365

Quick-note

Use of water changed from agricultural to industrial use

Summary

De Beers was a riparian owner and therefore entitled to use the water of the river for agricultural purposes. It now applied to use the water for industrial purposes (mining).

The application was granted, the court finding that there was sufficient water for the proposed use, and that other parties would not be prejudiced.

Sources Noted

1956 Act 54 s 1 “*industrial purposes*” – WLC 321.07
1956 Act 54 s 11(2)(a) – WLC 321.02, WLC 321.04, WLC 321.14

***Viljoen v SA Railways and Harbours* 1967 Uys WLC 322 WC**

[WLC 322 NOTES]

Judgment Date 1967-06-08. **Court** WC (Bloemfontein). **Judge(s)** HWO KLOPPER

Also reported as *Viljoen v SAS & H* Vos 367

Quick-note

Servitude to use impounded water – Riparian owner’s right to use normal flow for agricultural purposes – Normal flow and surplus water in dam indistinguishable

Summary

The Railways had a right of servitude to erect a weir in the B spruit on V’s property and to have the sole right to extract impounded water for Railway purposes. V pumped water for his farming purposes from hippo pools above the weir.

When the dam was full, the hippo pools were inundated, but V continued to extract his water there.

R claimed that V was wrongfully using impounded water and it claimed an order prohibiting V from extracting water from the pools, and damages for water thus extracted. It alleged that the terms of the servitude had to be interpreted that V had no right to extract water from the pools in any case.

HELD: That the servitude intended to include all water and not only surplus water.

HELD: That V was entitled to a reasonable part of the normal flow; that the normal flow which is impounded at the weir does not thereby become surplus water.

R’s claim was therefore dismissed.

Sources Noted

1922 Act 30 s 11 (Railways Construction) – WLC 322.15
1956 Act 54 s 1 “*owner*” – WLC 322.07
1956 Act 54 s 1 “*surplus water*” – WLC 322.27
1956 Act 54 s 1 “*use for agricultural purposes*” – WLC 322.25
1956 Act 54 s 6(1) – WLC 322.24
1956 Act 54 s 9(1) – WLC 322.24
1956 Act 54 s 47(3) – WLC 322.32
1956 Act 54 s 52 – WLC 322.24
1956 Act 54 s 175 – WLC 322.15
1957 GN 135 r 31(2) (Water Court Rules) – WLC 322.32
Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd 1944 AD 106 – WLC 322.11, WLC 322.14
Cuming v Cuming 1945 AD 201 – WLC 322.13
Eastern Free State Board of Executors v Theron 1922 AD 174 – WLC 322.14
Lanfear v Du Toit 1943 AD 59 – WLC 322.13
Union Government v Smith 1935 AD 232 – WLC 322.13
Van Pletzen v Henning 1913 AD 82 – WLC 322.13
Witwatersrand Township Estate and Finance Corporation v Ritch 1913 AD 423 – WLC 322.11
Worman v Hughes 1948 3 SA 495 A – WLC 322.13
DE VILLIERS JER *Water Law 5: The normal flow*, in SALJ 1921 38 254 – WLC 322.29, WLC 322.30

Bester v Noord-Agter-Paarl Irrigation Board 1967 Uys WLC 323 A

[WLC 323 NOTES]

Judgment Date 1967-10-02. **Court AD. Judge(s)** DH BOTHA, GN HOLMES, PJ WESSELS, HJ POTGIER, S BEKKER (Judges of Appeal)

Also reported as *Bester v Noord-Agter-Paarl Besproeiingsraad Vos 377*

Quick-note

Expropriation – fair market value

Summary

The N board expropriated B's land and offered R8000 compensation, which the water court found was a fair market value. On appeal to the AD –

HELD: The fair market value is the price which a willing seller can expect to receive from a willing buyer.

HELD: The court was not prepared to disturb the findings of the court a quo, in spite of some points of criticism against its judgment.

Sources Noted

1956 Act 54 s 60 – WLC 323.25

1956 Act 54 s 60(2) – WLC 323.01

1956 Act 54 s 60(4) – WLC 323.02

Krause v SA Railways & Harbours 1948 4 SA 554 O – WLC 323.29

Minister of Water Affairs v Mostert (2) 1966 Uys WLC 319 A – WLC 323.29

Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501 – WLC 323.29

Union Government v Jackson 1956 Uys WLC 273 A – WLC 323.29

Union Government v Maile 1942 Uys WLC 205 A – WLC 323.29

White v Union Government 1937 Uys WLC 195 C – WLC 323.35

Grant v Stonestreet 1968 Uys WLC 324 A

[WLC 324 NOTES]

Judgment Date 1968-08-02. **Court AD. Judge(s)** N OGILVIE-THOMPSON, DH BOTHA, PJ WESSELS, HJ POTGIETER (Judges of Appeal), EL JANSEN (Acting Judge of Appeal)

Also reported as *Grant v Stonestreet 1968 4 SA 1 A*

Quick-note

Servitude unregistered – buyer of servient property with knowledge of servitude is bound – even if buyer of dominant property did not know of servitude

Summary

Riparian owners on a public stream applied for an order declaring that an unregistered servitude relating to the use of the water of the stream is binding upon a fellow riparian owner

HELD: The onus is on the applicants to establish clear proof that the respondent had knowledge of the unregistered servitude.

HELD: Mala fides is not readily presumed.

Sources Noted

1906 CAPE Act. 32 s 7 (Irrigation) – WLC 324.138

1912 Act 8 s 138 – WLC 324.137, WLC 324.138

1956 Act 54 s 1 “existing right” – WLC 324.135, WLC 324.142

1956 Act 54 s 4 – WLC 324.133, WLC 324.136

1956 Act 54 s 4(1) – WLC 324.137, WLC 324.141, WLC 324.142

1956 Act 54 s 10 – WLC 324.133, WLC 324.134, WLC 324.137, WLC 324.142

1965 Act 25 s 37 (Civil Proceedings Evidence) – WLC 324.39

Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd 1944 AD 106 – WLC 324.60

De Jager v Sisana 1930 AD 71 – WLC 324.88

De Villiers v Barnard 1958 Uys WLC 285 A – WLC 324.139

Du Plessis Estates Ltd v SA Railways & Harbours 1933 Uys WLC 172 E – WLC 324.60

Erasmus v Du Toit 1910 TPD 1037 – WLC 324.91

Fourie v Oberholzer 1914 TPD 227 – WLC 324.108, WLC 324.110, WLC 324.112

Frye's (Pty) Ltd v Ries 1957 3 SA 575 A – WLC 324.71

Jansen v Fincham 1891-2 C (9 SC) 289 – WLC 324.88, WLC 324.89

Letsitele Stores (Pty) Ltd v Roets 1958 2 SA 224 T – WLC 324.110, WLC 324.112

Malan v Nabygelegen Estates 1946 AD 562 – WLC 324.109

Manganese Corporation Ltd v SA Manganese Ltd 1964 2 SA 185 W – WLC 324.112

Myers, R v 1948 1 SA 375 A – WLC 324.100

Nott v Liquidators of the Breyten Estates Ltd 1916 TPD 375 – WLC 324.115

Richards v Nash, 1880-2 C (1 SC) 312 – WLC 324.88

Ridler v Gartner 1920 TPD 249 – WLC 324.71, WLC 324.88, WLC 324.89, WLC 324.90

Smith v Strydom 1953 2 SA 799 T – WLC 324.39

Snyman v Muggleston 1935 CPD 565 – WLC 324.91

Union Government v Marais 1920 Uys WLC 68 A – WLC 324.60

Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 324.118, WLC 324.120

Beckenstrater v Sand River Irrigation Board (2) 1968 Uys WLC 325 A

[WLC 325 NOTES]

Judgment Date 1968-08-22. **Court AD.** **Judge(s)** LC STEYN (Chief Justice), PJ VAN BLERK, FHL RUMPF, PJ WESSELS (Judges of Appeal)

Also reported as *Beckenstrater v Sand River Irrigation Board* 1968 4 SA 209 A

Quick-note

Use of water on unscheduled land – irrigation board powers to adjust diversion times

Summary

The scheduled lands in an irrigation district received their water from two streams via a system of weirs, canals and furrows. Before the Water Act, 1956, came into effect, a water court apportioned the water and determined the method of diversion to the different owners. The irrigation board from time to time ordered the distribution according to the circumstances. When a canal fell into disuse, it arranged for the water to reach the owners in different ways and on different times. B was dissatisfied with an arrangement of the Board, and claimed that a specified volume of water be released to him and that he was entitled to irrigate certain unscheduled land. On appeal by B from the water court decision to the AD, held –

- (1) An arrangement under Act 8 of 1912 remained valid under Act 54 of 1956;
- (2) An irrigation board has the power to arrange the method of distribution, provided it does not reduce the quantity to which a farm is entitled
- (3) An owner in an irrigation district is not entitled to use his water on unscheduled land
- (4) The AD cannot assume and exercise the functions of an irrigation board.
- (5) The appeal by B was therefore dismissed.

Sources Noted

1912 Act 8 s 90 – WLC 325.46
1912 Act 8 s 89(1)(a) – WLC 325.53, WLC 325.54, WLC 325.55
1956 Act 54 s 63(6) – WLC 325.49
1956 Act 54 s 63(7) – WLC 325.46, WLC 325.51, WLC 325.59
1956 Act 54 s 88(1) – WLC 325.45, WLC 325.46, WLC 325.47, WLC 325.50, WLC 325.51, WLC 325.60
1956 Act 54 s 88(2) – WLC 325.46
1956 Act 54 s 88(5) – WLC 325.48
1956 Act 54 s 89(1) – WLC 325.47, WLC 325.50, WLC 325.51, WLC 325.52, WLC 325.54, WLC 325.59
1956 Act 54 s 89(3) – WLC 325.51, WLC 325.52, WLC 325.54, WLC 325.59
1956 Act 54 s 90(1) – WLC 325.60, WLC 325.61
1956 Act 54 s 92(1) – WLC 325.60
1956 Act 54 s 105 – WLC 325.53, WLC 325.55, WLC 325.56, WLC 325.58
1956 Act 54 s 181(1) – WLC 325.53
1956 Act 54 s 181(2) – WLC 325.53, WLC 325.54, WLC 325.55, WLC 325.56, WLC 325.58
Ohrigstad Besproeiingsraad v Slabbert 1965 Uys WLC 318 WC – WLC 325.41

Fourie v Van Rhyn 1968 Uys WLC 326 WC

[WLC 326 NOTES]

Judgment Date 1968-10-30. **Court WC** (Cape Town). **Judge(s)** LdeV VAN WINSEN

Also reported as *Fourie v Van Rhyn* Vos 393

Quick-note

Registered servitude – agreement that it would lapse – not binding on new owner

Summary

After R bought a farm in favour of which there was a registered servitude of aqueduct, the owner of the servient farm (F) claimed a declaration from the water court that the servitude was cancelled by agreement with R's predecessor. HELD:

- (1) F failed to prove that F knew of the cancellation agreement when he bought the farm or that he had constructive knowledge thereof, namely that he “closed his eyes to something which was obvious”; nor did F ratify or accept the cancellation agreement;
- (2) The cancellation agreement did not have the effect that the registered servitude lapsed.
- (3) F was therefore entitled to the benefit of the registered servitude..

Sources Noted

Botha v Minister of Lands 1965 1 SA 728 A – WLC 326.45
Consistory of Steytlerville v Bosman 1893 C (10 SC) 67 – WLC 326.40

Erasmus v Du Toit 1910 TPD 1037 – WLC 326.24
Frye's (Pty) Ltd v Ries 1957 3 SA 575 – WLC 326.44
Grant v Stonestreet 1968 Uys WLC 324 A – WLC 326.25, WLC 326.39
Hawkins v Munnik 1828-49 C (1 M) 465 – WLC 326.32
Jansen v Fincham 1891-2 C (9 SC) 289 – WLC 326.23
Lief v Dettmann 1964 2 SA 252 A – WLC 326.45, WLC 326.47
Lucas' Trustee v Ismael and Amod 1905 T 239 – WLC 326.40
Nel v Joubert 1953 Uys WLC 258 WC – WLC 326.32, WLC 326.50
Nott v Liquidator of the Breyton Estates Ltd 1916 TPD 375 – WLC 326.36
Ridler v Gartner 1920 TPD 249 – WLC 326.23, WLC 326.36, WLC 326.43
Salie v Abrahams 1900 C (17 SC) 363 – WLC 326.34
Snyman v Mugglestone 1935 CPD 565 – WLC 326.25
Van Vuren v Registrar of Deeds 1907 T 289 – WLC 326.38
Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 326.34, WLC 326.39
Witbank Collieries v Malan 1910 TPD 667 – WLC 326.34
 GROENEWEGEN *De Legibus Abrogatis ad Institutiones* 2 3 4 – WLC 326.37
 GROENEWEGEN *Notes on GROTIUS Inleidinge* 2 36 2 – WLC 326.37
 GROTIUS *Inleidinge* 2 36 2 – WLC 326.37
 VAN LEEUWEN *Rooms Hollands Recht* 2 19 2 – WLC 326.37
 VOET 8 1 6 – WLC 326.36, WLC 326.39
 VOET 8 4 1 – WLC 326.37
 VOET 8 6 1 – WLC 326.35

***Ellis v Botha* 1969 Uys WLC 327 WC**

[WLC 327 NOTES]

Judgment Date 1969-02-11. **Court** WC (Pretoria). **Judge(s)** PJ RABIE

Also reported as *Ellis v Botha* Vos 412

Quick-note

Unregistered servitude for weir – farm bought with knowledge of weir – purchaser bound

Summary

E acquired a riparian farm, the middle of the stream being the boundary with B's farm. There was a weir in the stream, the water being used by B. There was no servitude registered in respect of the weir, and E applied to the water court to order B to remove the weir.

B's defence was that there was an unregistered servitude by agreement between the farms' predecessors, and that E had acquired the farm with knowledge thereof.

HELD: It was proved that E knew of B's right to the weir and that although it was not a registered servitude, E was bound by it and had no right to claim its removal.

Sources Noted

1956 Act 54 s 1 "public stream" – WLC 327.01
Allen v Seckham 1878 47 LJ Ch 742, 1879 11 ChD 790 CA – WLC 327.35, WLC 327.38
Building Estates Brickfields Co (Parbury's case) 1896 1 Ch 100; 1896 65 LJ Ch 104 – WLC 327.38
Erasmus v Du Toit 1910 TPD 1037 – WLC 327.34, WLC 327.36, WLC 327.37, WLC 327.38, WLC 327.40
Grant v Stonestreet 1968 Uys WLC 324 A – WLC 327.34, WLC 327.39, WLC 327.40, WLC 327.41, WLC 327.42, WLC 327.43, WLC 327.44, WLC 327.45, WLC 327.46
Myers, R v 1948 1 SA 375 – WLC 327.45
Ridler v Gartner 1920 TPD 249 – WLC 327.34
Snyman v Mugglestone 1935 CPD 565 – WLC 327.34, WLC 327.40
Van den Berg v Van Tonder 1963 3 SA 558 T – WLC 327.34
Van der Hoven & Baintges Reef Gold Mining Co Ltd v Pansegrow 1894 T (1 OR) 247 – WLC 327.34, WLC 327.36, WLC 327.38

***Haviland Estates Pty Ltd v McMaster* 1969 Uys WLC 328 A**

[WLC 328 NOTES]

Judgment Date 1969-02-20. **Court** AD. **Judge(s)** OGILVIE THOMPSON JA, RUMPFF JA, HOLMES JA and POTGIETER JA

Also reported as *Haviland Estates Pty Ltd v McMaster* 1969 2 SA 312 A

Quick-Note

Servitude – right to divert water from furrow running over land – wording not clear – extrinsic evidence

Summary

In 1931, M became the owner of portion C of a farm. In 1966, H became owner of portion B. The title deeds contained a condition that "the property transferred is subject to a servitude of right of way and right of water". This condition was inserted in 1919 as a result of a notarial agreement between the respective predecessors in titles stating that the farm has "the right of diverting and taking from the present water furrow running across the said portion B sufficient water for household and domestic purposes and also for irrigating 2 acres of the said portion B".

The furrow carried water from a public stream on portion C, but M denied that the condition was a valid servitude of aqueduct, abutment or storage and he applied to the water court for an order amending the title deeds and declaring that H has no right to water from the stream and an interdict restraining H from coming onto portion B for the purpose of interfering (maintaining) the furrow.

H counterclaimed that he was (by agreements between predecessors in title) entitled to a certain minimum amount of water from the stream via the furrow and that a servitude of aqueduct (for the distance that the furrow ran over portion C to reach portion B) be registered. In the alternative, H claimed an apportionment of the water of the stream. The water court held that H was historically entitled to a certain minimum amount of water, but refused to order amendment of the title deeds or an apportionment.

H's appeal to the AD was upheld. It ordered that H was entitled to its claimed minimum amount of water via the furrow and that he may enter portion C for the purpose of maintaining the furrow and other works. M was interdicted from interfering with the flow of water or from polluting it.

[NOTE: The minority judgment of WESSELS JA is reproduced first, because he set out the facts. It is followed by the court's majority judgment, delivered by OGILVIE-THOMPSON JA]

Sources Noted

1912 Act 8 s 1 "public stream" – WLC 328.09

1956 Act 54 s 1 "public stream" – WLC 328.09

1956 Act 54 s 40(a) – WLC 328.34

1956 Act 54 s 40(e) – WLC 328.34

1956 Act 54 s 40(j) – WLC 328.34

Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 A – WLC 328.57, WLC 328.58, WLC 328.61, WLC 328.119

Gardens Estate Ltd v Lewis 1920 AD 144 – WLC 328.137

Grant v Stonestreet 1968 Uys WLC 324 A – WLC 328.50

Lanfeur v Du Toit 1943 AD 59 – WLC 328.55

Owsianick v African Consolidated Theatres (Pty) Ltd 1967 3 SA 310 A – WLC 328.55

Union Government v Marais 1920 Uys WLC 68 A – WLC 328.123

Van der Merwe v Viljoen 1953 1 SA 60 A – WLC 328.55

Willoughby's Consolidated Co Ltd v Cophall Stores Ltd 1918 AD 1 – WLC 328.123

Worman v Hughes 1948 3 SA 495 A – WLC 328.52

CAEPOLLA *De Servitutibus* 2 4 36, 95 – WLC 328.136

WIGMORE *Evidence* 9 2473 – WLC 328.122

***Badenhorst v Chambers* 1969 Uys WLC 329 A**

[WLC 329 NOTES]

Judgment Date 1969-03-03. **Court** AD. **Judge(s)** N OGILVIE THOMPSON, FHL RUMPF, PJ WESSELS, HJ POTGIETER, EL JANSEN (Judges of Appeal)

Also reported as *Badenhorst en Andere v Chambers* 1969 2 SA 282 A

Quick-note

Riparian property – public stream boundary – entitled to one-half of water – "reasonable use" towards lower owners

Summary

When the riparian farm W was subdivided in 1905, a servitude condition against the upper farm (the remainder) ensured that the lower farm (portion A) would receive one-half of the water of the M spruit. This servitude was necessary, because the Transvaal law at the time provided that a farm through which a stream flowed, was entitled to the reasonable use of the whole stream, and since the remainder was such a farm, it would mean that whenever it used all the water of the stream (as it was entitled to do), Portion A would receive no water.

In 1937 a water court apportioned all the water of the K river and its tributaries, "subject to existing servitudes". The M spruit was such a tributary. Furrows from farm W took water from the M spruit to the neighbouring farm R (owned by C) under agreements made over the years.

In 1968, due to the present uncertainty about the quantity of water to which the different farms in the area are entitled, and about the lawfulness of certain furrows, C approached the water court, which sorted the matter out and ordered a servitude of aqueduct to be registered in his farm's favour. One of the other owners (B, who was now the owner of, inter alia, portion A) appealed to the AD –

HELD: The apportionment of 1937 meant that the above servitude between portion A and the remainder of farm W continued in force. But the remainder was bound to deliver only the quantity of water to which it is entitled to under the 1937 order, because it cannot deliver more than it is entitled to. If the servitude obliges him to deliver more than the water court apportionment allows, his obligation extends only to the quantity of water allowed by the water court order. If the servitude obliges him to less than the water court order, he is may use the balance himself.

HELD: The water court's order was therefore approved and B's appeal was dismissed.

Sources Noted

1894 TRANSVAAL Act 11 s 2(2) (Public Streams) – WLC 329.39, WLC 329.43, WLC 329.47, WLC 329.50

1894 TRANSVAAL Act 11 s 10 (Public Streams) – WLC 329.39, WLC 329.43

1894 TRANSVAAL Act 11 s 12 (Public Streams) – WLC 329.39, WLC 329.43

1912 GN 982 r 9 (Principles to guide water Courts) – WLC 329.37

1956 Act 54 s 47(2) – WLC 329.01

1956 Act 54 s 47(3) – WLC 329.01
1956 Act 54 s 141 – WLC 329.01
1956 Act 54 s 145(1) – WLC 329.01
1956 Act 54 s 151(2) – WLC 329.01

Mader v Minister of Water Affairs 1969 Uys WLC 330 WC

[WLC 330 NOTES]

Judgment Date 1969-03-26. **Court** WC (Pretoria). **Judge(s)** O GALGUT

Also reported as *Mader v Minister of Water Affairs* Vos 404

Quick-note

Public stream – allocations

Summary

Mader claimed an order that a certain stream was not public; that the Minister had no power to control it through a government control area; that Mader was entitled to certain water rights based on existing use; and that the Minister had acted irregularly in failing to allocate water to certain properties.

The Minister replied that the stream was public and that the allocations were not final.

Held that the stream was public but the Government Notice was confusing about the finality of the allocations; accordingly that there should be no order as to costs.

Sources Noted

1956 Act 54 s 1 “public stream” – WLC 330.05
1956 Act 54 s 40(c) – WLC 330.01, WLC 330.06
1956 Act 54 s 59 – WLC 330.01, WLC 330.07
1956 Act 54 s 59(1) – WLC 330.02
1956 Act 54 s 62 – WLC 330.01, WLC 330.08
1956 Act 54 s 62(1) – WLC 330.01, WLC 330.09, WLC 330.23, WLC 330.25
1956 Act 54 s 62(2) – WLC 330.10, WLC 330.17
1956 Act 54 s 62(2)(bis) – WLC 330.01, WLC 330.03, WLC 330.12, WLC 330.14, WLC 330.17
1956 Act 54 s 62(8) – WLC 330.01, WLC 330.15, WLC 330.17, WLC 330.30
1961 Proc 91 (Lindleyspoort Government Water Control Area establishment) – WLC 330.02
1967 GN 1080 (Lindleyspoort Government Water Control Area determination) – WLC 330.03, WLC 330.17, WLC 330.29, WLC 330.31
Merber v Merber 1948 1 SA 446 A – WLC 330.33
Palley v Knight 1961 4 SA 633 Z – WLC 330.33

Louws Creek Irrigation Board v Roux 1969 Uys WLC 331 WC

[WLC 331 NOTES]

Judgment Date 1969-04-01. **Court** WC (Pretoria). **Judge(s)** Q DE WET

Also reported as *Louws Creek Irrigation Board v Roux and Others* Vos 409

Quick-note

Irrigation board – Powers.

Summary

The L board applied for an order restraining R from abstracting water through a pump and dam which he erected beyond the board’s waterworks but within its irrigation district.

R had no existing right but pleaded that the water abstracted would otherwise go to waste.

HELD: L had the power in terms of s 89(1)(a) “to prevent any unlawful abstraction of public water”. The defence was rejected.

Sources Noted

1956 Act 54 s 6(1) – WLC 331.08
1956 Act 54 s 89(1) – WLC 331.01, WLC 331.10, WLC 331.11, WLC 331.12, WLC 331.14, WLC 331.15, WLC 331.16
1956 Act 54 s 89(5) – WLC 331.15
1956 Act 54 s 89(7) – WLC 331.14
1956 Act 54 s 105 – WLC 331.01

Von During v Minister of Water Affairs 1969 Uys WLC 332 WC

[WLC 332 NOTES]

Judgment Date 1969-10-24. **Court** WC (Pretoria). **Judge(s)** I STEYN

Also reported as *Von During v Minister of Water Affairs* Vos 425

Quick-note

Expropriation – Compensation – Value of sugar quota – Transfer costs in buying a replacement farm – Interest

Summary

The value of bare land is not so much “enhanced” by the granting of a sugar quota as it is partly “restored” to the original and true value it possessed prior to the “restriction” which was imposed on its productivity by the introduction of the Sugar Agreement.

A claim for the costs of transfer and transfer duty in respect of a new farm purchased is too remote to be regarded as a loss which had to be compensated.

The applicant was awarded “statutory interest” on the amount of compensation outstanding for the period during which he was not in occupation of the property expropriated.

Sources Noted

1956 Act 54 s 60(3) – WLC 332.34, WLC 332.53

1956 Act 54 s 60(4) – WLC 332.53

1956 Act 54 s 60(4)bis – WLC 332.36, WLC 332.38, WLC 332.39, WLC 332.40, WLC 332.41, WLC 332.43, WLC 332.44, WLC 332.45, WLC 332.49, WLC 332.50, WLC 332.51, WLC 332.53

1956 Act 54 s 60(6) – WLC 332.37

Minister of Water Affairs v Mostert (2) 1966 Uys WLC 319 A – WLC 332.01, WLC 332.02, WLC 332.05, WLC 332.06, WLC 332.12, WLC 332.26, WLC 332.30, WLC 332.32

Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd 1965 1 SA 897 A – WLC 332.10

Fullard, S v 1970 Uys WLC 333 C

[WLC 333 NOTES]

Judgment Date 1970-02-20. **Court** CPD. **Judge(s)** JW VAN ZIJL, JH STEYN

Also reported as *S v Fullard* 1970 2 613 C

Quick Note

Changing a furrow which brings water from river to several farms – river water to be proven “public water”

Summary

F was found guilty of unlawfully changing a furrow leading water from a river over his farm, in contravention of s 170(1)(a).

He appealed on the ground that the river was neither a natural channel nor a public stream as required by s 89(5).

HELD: It was not proved that the river was a public stream, and F’s appeal succeeded.

Obiter: Parties to a dispute concerning water rights should not attempt to resolve it by way of a criminal prosecution, but should refer it to the water court for a civil decision.

Sources Noted

1956 Act 54 s 1 “public stream” – WLC 333.05

1956 Act 54 s 74 – WLC 333.08

1956 Act 54 s 89(1) – WLC 333.04, WLC 333.11

1956 Act 54 s 89(5) – WLC 333.05, WLC 333.08, WLC 333.12, WLC 333.13

1956 Act 54 s 89(7) – WLC 333.05, WLC 333.10, WLC 333.13

1956 Act 54 s 105 – WLC 333.08

1956 Act 54 s 170 – WLC 333.16

1956 Act 54 s 170(1) – WLC 333.02

Moelich, S v 1961 C (UR) – WLC 333.16

Vosloo, R v 1961 Uys WLC 302 C – WLC 333.16

Consolidated Citrus Estates v Minister of Water Affairs 1970 Uys WLC 334 WC

[WLC 334 NOTES]

Judgment Date 1970-06-22. **Court** WC (Pretoria). **DWAF File** 717. **Judge(s)** CDJ THERON

Quick Note

Water court order – whether affected by proclamation of government water control area – no jurisdiction to decide on validity of such proclamation

Summary

C was granted leave by the water court to abstract from the Olifants river a certain quantity of water per year for its non-riparian farm, Zebediela Estates. The point of abstraction was on a riparian farm belonging to the Government.

Shortly thereafter, the government farm was included in a government water control area, and the government then contended that the effect of the proclamation was to cancel the water court order and that C was no longer entitled to the water.

C applied to the water court to declare its water rights.

HELD: The water court cannot determine the effect of the proclamation on C’s water rights, because it will then have to decide on the validity of the proclamation, for which it had no jurisdiction in terms of s 59.

Sources Noted

1956 Act 54 s 1 “public stream” – WLC 334.14

1956 Act 54 s 11 – WLC 334.01, WLC 334.09

1956 Act 54 s 11(2) – WLC 334.05

1956 Act 54 s 40 – WLC 334.02
 1956 Act 54 s 40(c) – WLC 334.04
 1956 Act 54 s 59 – WLC 334.06
 1956 Act 54 s 59(1) – WLC 334.09, WLC 334.11, WLC 334.13, WLC 334.19
 1956 Act 54 s 60(4) – WLC 334.16
 1956 Act 54 s 62 – WLC 334.09, WLC 334.10, WLC 334.14, WLC 334.19
 1956 Act 54 s 62(2) – WLC 334.13
 1966 Act 11 s 3 (Water Amendment) – WLC 334.13
 1969 Proc 140 (Sekoekoenieland (Olifants River) Government Water Control Area establishment) – WLC 334.07, WLC 334.08, WLC 334.10, WLC 334.13, WLC 334.14, WLC 334.19
Minister of Water Affairs v Mostert (2) 1966 Uys WLC 319 A – WLC 334.16, WLC 334.17
CRIPPS Compulsory Acquisition of Land 4 ed 11 179 – WLC 334.16

***Phalaborwa Water Board v Struwig* 1970 Uys WLC 335 WC**

[WLC 335 NOTES]

Judgment Date 1970-10-15. **Court** WC (Pretoria). **Case** W632 & W633. **DWAF File** 852 & 853. **Judge(s)** S BEKKER

Quick Note

Expropriation of servitude of storage – compensation to be valued as on date when court grants the servitude.

Summary

P wanted to build a weir in a river and applied to the water court for a servitude of storage over two game farms and for the determination of compensation.

HELD: The court has to determine (1) the date when the right in terms of the servitude vests, namely the date when the court grants the servitude and (2) to what extent did the weir diminish the values of the farms as game farms.

As to (1): The compensation has to be determined on the date when the right vests. It is the water court which grants the applicant's claim for a servitude (s 146(1)), and only after the claim has been granted does the applicant acquire the servitude rights.

As to (2): Reasonable compensation is determined by balancing the nature and extent of actual loss caused by the servitude, with any advantages caused by the servitude to the servient owner. The "average market value" element provided for in s 60(3)(b) is a mere guideline to be considered when compensation is determined.

Sources Noted

1912 Act 8 s 110(4) – WLC 335.17
 1956 Act 54 Chapter 8 – WLC 335.07
 1956 Act 54 s 60(3) – WLC 335.16, WLC 335.17
 1956 Act 54 s 145 – WLC 335.06, WLC 335.12, WLC 335.14
 1956 Act 54 s 145(1)(a) – WLC 335.12
 1956 Act 54 s 145(2) – WLC 335.13
 1956 Act 54 s 146(1) – WLC 335.07
 1956 Act 54 s 146(2) – WLC 335.16
 1956 Act 54 s 146(4) – WLC 335.16
Mynhardt v Union Government 1943 Uys WLC 208 WC – WLC 335.09
Union Government v Gass 1959 Uys WLC 292 A – WLC 335.38
SAXON FM Appraising Flowage Easements, in *Condemnation Appraisal Practice* (USA) – WLC 335.19

***Booyesen v Pieterse* 1970 Uys WLC 336 WC**

[WLC 336 NOTES]

Judgment Date 1970-11-02. **Court** WC (Pretoria). **Case** W 649. **DWAF File** 854. **Judge(s)** JJ TRENGOVE

Quick Note

Servitude of storage – acquisition by prescription – element of non-consent – contrary to owner's rights

Summary

On farm L there is a dam in the river which flows over it. Water in this dam has since 1900 been taken via a furrow over farm L to farm T. In 1925 the owner of T enlarged the dam and furrow with the consent of the owners of L. From 1925 the water from the furrow was also used for irrigation and other purposes on farm L.

The owner of T now claims that he had by prescription acquired servitudes to store the water in the stream and to take it from the dam via the furrow to T. They claim that they and their predecessors in title had for more than 30 years thus used the dam, the furrow and the water without force, stealth or consent (*nec vi, nec clam, nec precario*) and contrary to the rights of the owners of L.

The owner of L denied this, on the basis that his consent in 1925 to enlarge the dam and furrow, implied that the element of non-consent required for prescription, was absent.

Held, on the element of non-consent (*nec precario*): the applicant must prove an irrevocable consent; consent to enlarge an existing dam and continue to use the water therein is, by its nature, and in the absence of an express stipulation that it can be revoked at any time, irrevocable.

Held, on the element of contrary rights: The owner of L intentionally restricted his own rights by allowing the applicant the right to store water; the mere fact that the applicant's rights arose from an agreement with the respondent, does not imply that it was not contrary to the respondent's rights.
Servitude therefore granted.

Sources Noted

City of Cape Town v Abelson's Estate 1947 3 SA 315 – WLC 336.10
Du Toit v Furstenberg 1957 1 SA 501 O – WLC 336.59
Ellis v Laubscher 1956 Uys WLC 276 A – WLC 336.50, WLC 336.65
Malan v Nabygelegen Estates 1946 A 562 – WLC 336.11, WLC 336.57, WLC 336.59
Mullin Pty Ltd v Benade 1952 1 SA 211 A – WLC 336.51
Texas Co (SA) Ltd v Cape Town Municipality 1926 A 467 – WLC 336.10
Wynne v Pope 1960 3 SA 37 C – WLC 336.59
POTHIER Pandects 18 43 26 – WLC 336.11

***Minister of Water Affairs v Von During* 1970 Uys WLC 337 A**

[WLC 337 NOTES]

Judgment Date 1970-11-17. **Court AD. Judge(s)** PJ VAN BLERK (Acting Chief Justice), PJ WESSELS, FHL RUMPF (Judges of Appeal), AJ SMIT, MM CORBETT (Acting Judges of Appeal)

Also reported as *Minister of Water Affairs v Von During* 1971 1 SA 858 A

Quick Note

Expropriation – compensation – comparable transactions – date of valuation – interest

Summary

D's farm was expropriated and he appealed against the amount of compensation awarded by the water court. The State cross-appealed.

HELD: In determining the compensation, the court make take into account the value awarded by a previous court for similar land; but it is not a 'comparable transaction'.

HELD: The date for determining the valuation is the date of expropriation, in this case 3 months after the notice under s 60 was issued.

HELD: The Water Court has no jurisdiction to determine and allow interest on compensation.

Sources Noted

1936 Act 18 s 13(5) (Native Trust and Land) – WLC 337.77
1956 Act 54 s 34(1) – WLC 337.72
1956 Act 54 s 40(a) – WLC 337.72
1956 Act 54 s 60 – WLC 337.01, WLC 337.37
1956 Act 54 s 60(1) – WLC 337.47
1956 Act 54 s 60(2) – WLC 337.35, WLC 337.37, WLC 337.38, WLC 337.39
1956 Act 54 s 60(3) – WLC 337.02, WLC 337.40, WLC 337.42, WLC 337.63, WLC 337.65, WLC 337.66, WLC 337.74, WLC 337.76
1956 Act 54 s 60(4) – WLC 337.70, WLC 337.73, WLC 337.76
1956 Act 54 s 60(4)bis – WLC 337.03, WLC 337.69, WLC 337.80, WLC 337.81, WLC 337.85
1956 Act 54 s 60(6) – WLC 337.35
1959 Act 59 s 12(3) (Supreme Court) – WLC 337.90
1961 Act 56 s 10 (Water Amendment) – WLC 337.37, WLC 337.68, WLC 337.70
1967 Act 79 s 5 (Water Amendment) – WLC 337.10
Birmingham City Corporation v West Midland Baptist (Trust) Association (Incorporated) 1969 3 All ER 172 – WLC 337.47
Marks Estate v Pretoria City Council 1969 3 SA 227 A – WLC 337.67
Minister of Water Affairs v Mostert (2) 1966 Uys WLC 319 A – WLC 337.06, WLC 337.08, WLC 337.09, WLC 337.11, WLC 337.24, WLC 337.25, WLC 337.26, WLC 337.51, WLC 337.52
SA Naturelletrust v Kitchener 1964 Uys WLC 316 A – WLC 337.49, WLC 337.76, WLC 337.77
Union Government v Jackson 1956 Uys WLC 273 A – WLC 337.45, WLC 337.75, WLC 337.76, WLC 337.78

***Pieterse v Du Plessis* 1971 Uys WLC 338 A**

[WLC 338 NOTES]

Judgment Date 1971-03-11. **Court AD. Judge(s)** PJ VAN BLERK, GN HOLMES, EL JANSEN (Judges of Appeal), S MILLER, GPC KOTZÉ (Acting Judges of Appeal)

Also reported as *Pieterse v Du Plessis* 1972 2 SA 597 A

Quick Note

Servitude of aqueduct – pipes damaged when servient owner cleared his land – damages – proof that pipes were laid correctly.

Summary

A servitude of aqueduct agreement allowed D to lay pipes over P's land. It specified how deep the pipes are to be laid so that P could use the land above it. P cleared his land with a heavy bulldozer, which damaged the asbestos pipes underground by compressing soil and stones above them.

The court allowed D's damages claim. On appeal:

HELD: A servitude limits the rights of the servient owner; therefore the agreement is to be interpreted to be the least burdensome to him. The holder of the servitude therefore has to prove that the pipes were laid correctly and expertly, and were still at the specified depth.

Sources Noted

Kakamas Management Board v Louw 1960 Uys WLC 296 A – WLC 338.16

SCHORER *Aantekeningen op Grotius* 200 4 – WLC 338.15, WLC 338.16

SCHORER *Vermeerderde Aantekeningen op Grotius* 303 – WLC 338.16

VAN HASSELT *Rechtsgeleerde Brieven* 313 286 – WLC 338.13, WLC 338.15

VOET 8 2 2 – WLC 338.15, WLC 338.16

***Dickinson v Minister of Water Development* 1971 Uys WLC 339 Z**

[WLC 339 NOTES]

Judgment Date 1971-03-24. **Court** RAD [Appellate Division of the High Court of Rhodesia].

Judge(s) HN MACDONALD (Acting Chief Justice), JVR LEWIS (Acting Judge-President)

Also reported as *Dickinson v Minister of Water Development* 1971 3 SA 71 RAD

Quick Note

Compensation for expropriation – costs

Summary

Water court's determination of compensation on expropriation was more than offered but much less than claimed – owner successful and therefore entitled to costs.

Sources Noted

1963 ZIM Chap 268 s 149 (Water) – WLC 339.01, WLC 339.02, WLC 339.07

Van der Merwe v McGregor 1913 Uys WLC 13 C – WLC 339.05

Minister of Irrigation v Smith 1959 2 RNR 192 – WLC 339.16

White v Union Government 1937 Uys WLC 195 C – WLC 339.11

***Du Toit v Krige* 1971 Uys WLC 340 WC**

[WLC 340 NOTES]

Judgment Date 1971-10-22. **Court:** WC (Cape Town). **Case** W10/70. **Judge(s)** AB BEYERS (Judge-President).

Quick Note and Summary

A tributary may be the source of a public stream even if it is a public stream itself.

[NOTE: The Cape High Court files up to 1975 are kept by the Cape Archives. But this file was described as “in a mess”. The judgment is missing and there is a note in the file that it was removed by Adv AM Diemont. In 2004 he told the editor of this work that he removed it on behalf of his grandfather, DIEMONT JA (who owned one of the properties involved in this case and who needed it for the purpose of writing his memoirs) but that he could not find the judgment amongst his late grandfather's papers. There is not even a copy in the Department of Water Affairs' files. All that could be found of this important judgment is the following extract, which was reproduced in *Van Rensburg v Taute* 1974 WLC 350 A]

Sources Noted

Somerset West Municipality & Cape Explosives Works Ltd 1936 Uys WLC 186 WC – WLC 340.07, WLC 340.08

Struben v Cape Town District Waterworks Co 1891-2 C (9SC) 68 – WLC 340.05, WLC 340.09

Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 340.02, WLC 340.03

DE VILLIERS *JER Water Law 1: The 8th section [of Act 8 of 1912]*, in SALJ 1920 37 247 – WLC 340.03, WLC 340.04

***Oosthuizen v Cronje* 1971 Uys WLC 341 WC**

[WLC 341 NOTES]

Judgment Date 1971-11-08. **Court:** WC (Pretoria). **Judge(s)** JJ TRENGOVE. **Case** W 657. **DWAF File** 708.

Quick Note

Servitude right to a water turn – requirements of an informal agreement – prescription

Summary

There was an arrangement between neighbours to divide a water turn among them, and after a number of years one of them claimed to have acquired a servitude right to his turn by prescription.

HELD: To create a servitude, there must be an express agreement between owners of separate pieces of land to create a permanent servitude whereby the rights of the servient land is restricted. The intention to create a servitude requires that the parties be fully aware of their rights as well as the circumstances connected to the transaction; the act must be unequivocal; and the agreement must not extend to more than the parties contemplated.

HELD: The arrangements between the neighbours before 1947 were not binding servitude agreements. The 1947 agreement constituting such a servitude was in any case less than 30 years ago, which is the prescription period.

Sources Noted

Payne v Estate Rennie 1960 4 SA 261 – WLC 341.45

WESSELS *Law of Contract in South Africa* par 266 – WLC 341.34

***Fourie v Marandellas Town Council* 1972 Uys WLC 342 Z**

[WLC 342 NOTES]

Judgment Date 1972-03-09. **Court:** High Court of Rhodesia General Division (Salisbury). **Judge(s)** CEL BECK J

Also reported as *Fourie v Marandellas Town Council* 1972 2 SA 698 RGD

Quick Note

Servitude of storage with extended rights of holder – includes yachting

Summary

A servitude of storage stated that the servitude holder (M) is entitled to make “such further use of the area covered by the servitude of storage as it may desire”. M rented the use of the dam to the yacht club. The owner of the servient land objected that this use was not included in the servitude agreement.

HELD: The clause expressly extended the accessory powers which are by common law deemed to be granted with servitudes (that is, rights reasonable necessary for the effective exercise of the servitude). These extended powers do not necessarily establish a *servitus usus*.

HELD: The land owner had not objected for a long time, and even participated in certain activities of the club.

Sources Noted

1939 ZIM Chap 251 s 94 (Water Act) – WLC 342.02, WLC 342.13, WLC 342.14, WLC 342.15

1963 ZIM Chap 124 s 35 (Local Government Act) – WLC 342.20

1963 ZIM Chap 124 Schedule 1 (Local Government Act) – WLC 342.20

1963 ZIM Chap 125 s 256(7) (Municipal Act) – WLC 342.20

1974 ZIM Chap 268 s 104(1) (Water Act) – WLC 342.13

GROTIUS 2 44 6-8 – WLC 342.25

VOET 7 8 4 – WLC 342.25

VOET 8 4 16 – WLC 342.13

WESSELS *Law of Contract in South Africa* ed 2 par 1969+ – WLC 342.24

***De Kock v Minister of Water Affairs* 1972 Uys WLC 343 WC**

[WLC 343 NOTES]

Judgment Date 1972-07-20. **Court** WC (Bloemfontein). **DWAF File** 729. **Judge(s)** HJO KLOPPER

Quick Note

“Lawful abstraction” – meaning – reasonable use of normal flow for irrigation of irrigated area.

Summary

The Vaal River Development Act of 1934 prohibited any extraction from the river without a permit, except “lawful abstraction at the commencement of the Act”.

On that date farmer K extracted 130000 gallons per day from the Vaal river to irrigate his 70 morgen (that is, 47.5 M gallons per year). But he claimed to need 200 M gallons per annum to irrigate his 70 morgen.

The Minister offered him 38 M gallons per annum, but K refused the offer.

HELD: “Lawful abstraction” meant the average legal abstraction from the river for irrigation purposes during the year 1933/34. “Lawful” refers to the reasonable use of normal flow excluding wastage; “reasonable use” being according to the standards of use at the time.

HELD: K was therefore entitled to abstract, when available, 200 M gallons per year from the Vaal River for agricultural purposes, without a permit.

Sources Noted

1934 Act 38 s 6 (Vaal River Development Scheme) – WLC 343.02, WLC 343.03, WLC 343.04, WLC 343.06, WLC 343.07

1956 Act 54 s 1 “*agricultural purposes*” – WLC 343.01, WLC 343.14

1956 Act 54 s 59 – WLC 343.03

DE VILLIERS JER *Water Law* 4: *Sections 8-10: The normal flow*, in SALJ 1921 38 254 – WLC 343.10

DE VILLIERS JER *Water Law* 11: *Use of surface water without protection*, in SALJ 1922 39 408 – WLC 343.10

***Jordaan, S v* 1973 Uys WLC 344 C**

[WLC 344 NOTES]

Judgment Date 1973-03-04. **Court:** CPD. **Judge(s)** JT VAN WYK (Judge President), AP BURGER.

Also reported as *S v Jordaan* 1974 3 SA 580 C

Quick Note

Interfering with water works – defence that accused has a water right – criminal court not in a position to judge it

Summary

J was found guilty in the regional court of illegally diverting water from a furrow.

J alleged that he obtained permission from upper owners to lead water from a river on their properties to his land some 25 km away in a furrow which traversed the property of F (the complainant).

On appeal, held that the lower court did not ascertain the rights of the parties, whether there was a servitude, or even if the water in the furrow was public water. Therefore the appeal succeeded.

The court restated that if a matter involves disputed water rights, the State should refer it to the water court instead of instituting a criminal prosecution.

Sources Noted

1956 Act 54 s 170 – WLC 344.02, WLC 344.12

1956 Act 54 s 170(1) – WLC 344.01

Fullard, S v 1970 Uys WLC 333 C – WLC 344.14

Rabie v De Wit 1946 C 346 – WLC 344.10

Vosloo, R v 1961 Uys WLC 302 C – WLC 344.14

***Daljosaphat IrrigationBoard v S Louria Pty Ltd* 1973 Uys WLC 345 C**

[WLC 345 NOTES]

Judgment Date 1973-04-02. **Court** CPD. **Case** M289/73. **DWAF File** 765. **Judge(s)** HEP WATERMEYER.

Quick Note

Apportionment of all water in stream – one owner not entitled to store all surplus water

Summary

A water court gave S the right to extract water from a stream for 12 hours per week. He started to build a weir in the stream in order to store the surplus water, alleging that the lower owners are entitled to the normal flow only, and that they received it through a pipe which diverted the normal flow upstream of the proposed weir. The irrigation board applied for an interdict against the construction of the weir.

HELD: The water court order was a division of all the water in the river: both normal flow and surplus water. Even if S was entitled to impound surplus water, his dam would impound more than surplus water.

HELD: The dam would therefore interfere with the lower owners' right to receive an uninterrupted flow for 6½ days per week.

HELD: An offer to release additional water from the dam in certain circumstances was unacceptable because it would not protect the lower owners sufficiently.

The interdict was granted on condition that the application to prohibit the construction of the dam was brought within six weeks.

Sources Noted

[No sources were noted in the judgment]

***Taute v Janse van Rensburg* 1973 Uys WLC 346 WC**

[WLC 346 NOTES]

Judgment Date 1973-10-09. **Court:** WC (Cape Town). **Judge(s)** JW VAN ZIJL. **Case** W7/70. **DWAF File** 763.

Quick Note

Servitude of water division – prohibited further dams – whether applicable to dams in source streams – prescription of servitude

Summary

There were two dams in a river which flowed through a farm. The river was constituted by the confluence of several streams which arose on the adjoining upper farm in the foothills of in the Outeniqua mountain. Both farms belonged to the same 6 owners in undivided shares and in 1875 they consolidated and re-subdivided the two farms and by mutual servitudes arranged how the water was to be divided between them.

In the course of time the portions were further subdivided, and the upper owners built 18 dams in the feeder streams.

Then, almost a century after the 1875 agreement, a lower owner (T) came to the conclusion that the upper dams were contrary to the agreement, and asked the water court to order their removal.

Defence (1) was that the water court had no jurisdiction in connection with dams in the upper streams because they were private streams. HELD: (after examining the topography in detail) that the upper streams are sources of the Diep river, which is a public stream; and that its feeder streams are therefore also public streams. Except for 2 dams which were not in public streams

Defences (2) & (3) was that the 1875 agreement did not intend to prohibit storage dams, or any dams on the upper farm.

HELD: The word “dam” as used in the agreement does not support such an interpretation

Defence (4) was that the servitudes were registered and binding on all the properties and their later subdivisions. HELD: the servitude was not registered against Portion C of the upper farm because it was until recently owned by the same person who owned portion C of the lower farm. Therefore the servitude did not apply to the present owners of the subdivisions of portion C of the upper farm.

Defence (5) was that the servitudes had prescribed. HELD: Only 2 of the dams were constructed more than 30 years ago. Discussed how prescription of a servitude is to be proved.

Defence (6) was that the servitude had been waived. Held that this was not proved.

The dams were therefore ordered to be removed, except those which were outside the court's jurisdiction (that is, in private streams) and those on subdivisions of Portion C of the upper farm (to which the servitudes did not apply).

The judgment was confirmed on appeal: *Van Rensburg v Taute* 1974 Uys WLC 350 A (below).

Sources Noted

1876 CAPE Act 24 (Right of Passage of Water) – WLC 346.31

1956 Act 54 s 1 “private water” – WLC 346.12

1956 Act 54 s 1 “public stream” – WLC 346.12

1956 Act 54 s 1 “public water” – WLC 346.12

1956 Act 54 s 4 – WLC 346.09

1956 Act 54 s 41(1) – WLC 346.95

1956 Act 54 s 47(2) – WLC 346.95

1956 Act 54 s 47(3) – WLC 346.95

Cairns Pty Ltd v Playdon & Co Ltd 1948 3 SA 99 A – WLC 346.26

Du Toit v Krige 1971 Uys WLC 340 WC – WLC 346.11

Ellis v Laubscher 1956 Uys WLC 276 A – WLC 346.77

Hepner v Roodepoort-Maraiburg Town Council 1962 4 SA 772 A – WLC 346.84

Laws v Rutherford 1924 A 261 – WLC 346.84

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 346.59

Myers v Van Heerde 1966 2 SA 649 C – WLC 346.48

Somerset West Municipality and Cape Explosives Works 1936 Uys WLC 186 WC – WLC 346.11, WLC 346.14

Van Heerden v Weise 1880-4 A (1 BAC) 5 – WLC 346.14

Willoughby's Consolidated Co Ltd v Copthall Stores Ltd 1918 A 1 – WLC 346.25

BIONDI B *Il servitu prediali nel diritto romano* 100 9 43-8 p 212-84 – WLC 346.70, WLC 346.72

D 8 2 6 – WLC 346.65

DE VILLIERS JER *Water Law 3: The 8th section again: public streams*, SALJ 1921 38 13 – WLC 346.13

DE VILLIERS JER *Water Law 4: Sections 8-10: The normal flow*, SALJ 1921 38 121 – WLC 346.13

DE VILLIERS JER *Water Law 7: Tributaries*, SALJ 1921 38 389 – WLC 346.13

DECKER ad VAN LEEUWEN *Roman-Dutch Law* 2 21 16 – WLC 346.25

ELVERS 73 3, 4 on p 775+ – WLC 346.73, WLC 346.74, WLC 346.77

ELVERS R *Die Römische Servitutenlehre* 40 p357-77, 62 p 653-4, 73 p 772-85 – WLC 346.66

GLÜCK ad D 10 p 265 – WLC 346.66

HUBER 2 44 7 – WLC 346.25

HUBER *Hedendaagse Rechtsgeleertheit* 2 45 5 – WLC 346.67

SALKOWSKI *Roman Private Law* 467 – WLC 346.66

SCHORER ad GROTIUS 206 – WLC 346.25

SOHM *Institutes of Roman law* (tr Ledlie ed 3) 69 5 p 345 – WLC 346.64

VAN DER KEESSEL *Praelectiones* 2 37 7 (tr Gonin p 159) – WLC 346.69

VAN OVEN *Leerboek van Romeinsch Privaatrecht* ed 3 p 152 – WLC 346.66

VOET 8 6 11 – WLC 346.68

WINDSCHEID 1 p 651 – WLC 346.66

***Heyneke v Abercrombie* 1973 Uys WLC 347 T**

[WLC 347 NOTES]

Judgment Date 1973-10-26. **Court:** TPD. **Judge(s)** CF ELOFF.

Also reported as *Heyneke v Abercrombie* 1974 3 SA 338 T

Quick Note

Inclusion of unregistered land in irrigation board schedule

Summary

A contract of sale of a pending subdivision of a farm read that 10 morgen thereof would be entitled to be incorporated in the Crocodile River Irrigation Board canal.

The buyer alleged that the property was not entitled to be so incorporated until it is registered as a separate entity; that such registration may take years; and that the intention was that the property would have the benefit of the canal water from date of occupation. He therefore sued for damages due to breach of contract.

The seller pleaded that the buyer should have known that under the Water Act a piece of land has to be registered before the owner can claim scheduling with the irrigation board; the guarantee could therefore only take effect on transfer of the property; and therefore the claim was premature.

HELD: An irrigation board has a discretion to schedule land, even before transfer. Scheduling is therefore not absolutely impossible. The seller's plea that the guarantee can never come into effect before transfer, was therefore unsuccessful.

Sources Noted

1956 Act 54 Chapter 6 – WLC 347.10
1956 Act 54 s 63(7) – WLC 347.19
1956 Act 54 s 63(8) – WLC 347.17, WLC 347.18
1956 Act 54 s 63(8) – WLC 347.17, WLC 347.20, WLC 347.21, WLC 347.26, WLC 347.28
1956 Act 54 s 88 – WLC 347.10, WLC 347.14
1956 Act 54 s 88(1) – WLC 347.11, WLC 347.13, WLC 347.14
1956 Act 54 s 88(8) – WLC 347.17, WLC 347.26
1956 Act 54 s 89 – WLC 347.15
1956 Act 54 s 89(3) – WLC 347.15
1961 Act 56 s 14 (Water Amendment) – WLC 347.17
1963 Act 63 s 1 (Water Amendment) – WLC 347.20
1965 Act 71 s 5 (Water Amendment) – WLC 347.17
Tighy v Putter 1949 1 SA 1087 T – WLC 347.23
Hersman v Shapiro & Co 1926 T 367 – WLC 347.30

***Buglers Post Pty Ltd v Secretary for Inland Revenue* 1974 Uys WLC 348 A**

[WLC 348 NOTES]

Judgment Date 1974-03-21. **Court:** AD. **Judge(s)** FLH RUMPF (Acting Chief Justice), DH BOTHA, EL JANSEN, PJ RABIE (Judges of Appeal), and MM CORBETT (Acting Judge of Appeal)

Also reported as *Buglers Post Pty Ltd v Secretary for Inland Revenue* 1974 3 SA 28 A

Quick Note

Cost of erecting irrigation works deductible from income tax – but not cost of acquiring water.

Summary

B bought water rights from a neighbour, and constructed the necessary water works to bring the water to his property. He deducted from income tax the cost of erecting the works, in terms of par 12(1)(d) of Schedule 1 of the Income Tax Act, 1962, which allowed farmers to deduct expenditure incurred in respect of “dams, irrigation schemes, boreholes and pumping plants”.

B also deducted the cost of buying the water, alleging that the buying of water rights was closely associated with the water itself, being an integrated scheme, and that it was therefore an expense “in respect of” an irrigation scheme. The Receiver disallowed this deduction and B appealed.

HELD: An irrigation scheme is a type of capital improvement for which an exception is made: the costs thereof are tax deductible. But the water itself is not part of the improvement – just as water cannot be regarded as an integral part of a borehole or a dam – and the cost of buying the water is not deductible.

Sources Noted

1925 Act 40 s 15(12) (Income Tax) – WLC 348.21
1929 Act 29 s 3(b) (Income Tax) – WLC 348.22
1941 Act 31 s 14(12) (Income Tax) – WLC 348.23, WLC 348.23
1954 Act 55 s 5 (Income Tax) – WLC 348.23
1962 Act 58 s 11(2)(a) (Income Tax) – WLC 348.14
1962 Act 58 s 26 (Income Tax) – WLC 348.09, WLC 348.17
1962 Act 58 Sched 1 12(1)(d) (Income Tax) – WLC 348.07, WLC 348.08, WLC 348.10, WLC 348.12, WLC 348.17, WLC 348.18, WLC 348.20, WLC 348.21
1962 Act 58 Sched 3 17 (Income Tax) – WLC 348.14
Commissioner for Inland Revenue v Crown Mines Ltd 1923 A 121 – WLC 348.11
Ellert v Commissioner for Inland Revenue 1957 1 SA 483 A – WLC 348.15, WLC 348.16
Ernst v Commissioner for Inland Revenue 1954 1 SA 318 A – WLC 348.13, WLC 348.14, WLC 348.15, WLC 348.16
Hogg v Parochial Board of Auchtermuchty 7 Rettie 986 – WLC 348.14
ITC 853 22 SATC 191 – WLC 348.08, WLC 348.13
ITC 859 22 SATC 292 – WLC 348.08, WLC 348.13
ITC 923 24 SATC 246 – WLC 348.08
Sekretaris van Binnelandse Inkomste v Raubenheimer 1969 4 SA 314 A – WLC 348.11
CRAIES *Statute Law* 109 – WLC 348.14
GROTIUS in HOLL CONS 3(2) 340 p 702 – WLC 348.19
HOLL CONS 3(2) 340 p 702 – WLC 348.19
STEYN LC *Uitleg van Wette* ed 3 29 – WLC 348.19

***Yanqua Middeldrift Edms Bpk v Aspoort Irrigation Board* 1974 Uys WLC 349 C**

[WLC 349 NOTES]

Judgment Date 1974-06-03. **Court:** CPD. **Judge(s)** WJ VOS, W VIVIER (Acting Judges)

Also reported as *Yanqua Middeldrift (Edms) Bpk v Aspoort Besproeiingsraad* 1974 4 SA 473 C

Quick Note

Irrigation board – rates to pay for planning works outside its district

Summary

An owner of land (Y) was sued by the irrigation board for payment of rates in respect of his scheduled land in the irrigation district. Y's defence was that the rates were not payable because such rates were to be used to defray expenses which the board incurred illegally. On appeal.

HELD: An irrigation board has a statutory right to collect rates, and the only defence for an owner is that the recovery steps were illegal: it is no defence to aver that the irrigation board's expenses were illegal.

HELD: That an irrigation board may construct works outside its district and may undertake ancillary work for purposes of such construction.

HELD: Although ministerial permission has to be obtained before construction of such works, planning and feasibility studies may be undertaken prior to applying for the permit.

Sources Noted

1912 Act 8 s 89(1) – WLC 349.07

1956 Act 54 s 62(2) – WLC 349.21

1956 Act 54 s 79(3) – WLC 349.09

1956 Act 54 s 79(2) – WLC 349.12

1956 Act 54 s 89 – WLC 349.17

1956 Act 54 s 89(1) – WLC 349.09, WLC 349.10, WLC 349.11, WLC 349.12, WLC 349.13, WLC 349.17, WLC 349.18, WLC 349.19, WLC 349.20

1956 Act 54 s 90(1) – WLC 349.05

1956 Act 54 s 98 – WLC 349.05

City of Cape Town v Claremont Union College 1934 A 414 – WLC 349.11

Makoka v Germiston City Council 1961 3 SA 573 A – WLC 349.11

Middelburg Irrigation Board v Julius Koenig's Estates 1930 Uys WLC 149 T – WLC 349.06, WLC 349.07, WLC 349.08

***Van Rensburg v Taute* 1974 Uys WLC 350 A**

[WLC 350 NOTES]

Judgment Date 1974-09-30. **Court:** AD. **Judge(s)** PJ WESSELS, PJ RABIE, GvR MULLER, MM CORBETT, S HOFMEYR (Judges of Appeal)

Also reported as *Van Rensburg v Taute* 1975 1 SA 279 A

Quick Note

Servitude not to build dams in upper streams – water court has no jurisdiction if they are private streams – extinctive prescription re dams built more than 30 years ago – waiver of servitude rights.

Summary

A water court ordered that certain dams in the sources of a public stream be removed to comply with a servitude; on appeal –

HELD: A water court has jurisdiction to order the removal of dams which store public water; but not if it stores private water;

A public stream contains public water right up to its headwaters and sources; but a stream which joins a stream which is already a public stream, cannot be a source thereof.

The reference to “any dams” in the servitude agreement is not to be limited to in-channel dams;

All owners of servient land under the servitude are bound by the servitude even if they can hardly cause detriment by acting contrary to the servitude;

To prove that the servitude has lapsed due to prescription, conduct which was materially contrary to the agreement, must be proved: failure to successfully defend rights does not constitute waiver of such rights.

Sources Noted

1956 Act 54 s 1 “public stream” – WLC 350.06, WLC 350.31

1956 Act 54 s 1 “public water” – WLC 350.32

1956 Act 54 s 34(1) – WLC 350.28

1956 Act 54 s 40 – WLC 350.28

1956 Act 54 s 40(a) – WLC 350.29, WLC 350.41, WLC 350.46

1956 Act 54 s 40(g) – WLC 350.30, WLC 350.41

Cuming v Cuming 1945 A 201 – WLC 350.54

Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 A – WLC 350.55

Du Toit v Krige 1971 Uys WLC 340 WC – WLC 350.38

Inrybelange (Edms) Bpk v Pretorius 1966 2 SA 417 A – WLC 350.55

Jaga v Dönges; Bhana v Dönges 1950 4 SA 653 A – WLC 350.56

Lanfeer v Du Toit 1943 A 59 – WLC 350.54

McIntosh v Warrenton Village Management Board, 1909 C (26 SC) 249 – WLC 350.62, WLC 350.65

Myers v Van Heerde 1966 2 SA 649 C – WLC 350.68

Pieterse v Du Plessis 1971 Uys WLC 338 A – WLC 350.48

Taute v Janse van Rensburg 1973 Uys WLC 346 WC – WLC 350.03

Union Government v Smith 1935 A 232 – WLC 350.54

Van Pletzen v Henning 1913 A 82 – WLC 350.54

Worman v Hughes 1948 3 SA 495 A – WLC 350.54

***Anglo-American Rhodesian Development Corporation Ltd v Thetford Estates Pvt Ltd* 1974 Uys WLC 351 Z**

[WLC 351 NOTES]

Judgment Date 1974-11-27. **Court:** Rhodesian AD. **Judge(s)** THW BEADLE (Chief Justice) HN MACDONALD (Judge President), JVR LEWIS (Judge of Appeal)

Also reported as *Anglo-American Rhodesian Development Corporation Ltd v Thetford Estates Pvt Ltd* 1975 2 SA 159 ZA

Quick Note

Right to impound normal flow of river – whether limited to certain quantity of water

Summary

The water court granted a provisional right to A, to store and use (from a specified date) a certain quantity of the normal flow of the Mazoe river until a final grant is made to A or other riparian owners. On appeal against the terms of the grant –

HELD: Normal flow means all the water (surplus and normal flow) of a whole catchment area above the point of storage, and not the water of only a particular stream in that area.

HELD: The water court may not disturb the priority which an owner enjoyed in respect of earlier rights granted to him: the specified date should have been only in respect of the additional water granted;

HELD: The water court was not entitled to reserve for other users, a part of the water granted to A.

Sources Noted

1913 ZIM Ord 13 s 44 (Water) – WLC 351.29, WLC 351.30

1939 ZIM Chap [?] (Water Act) s 34 – WLC 351.09

1939 ZIM Chap [?] (Water Act) s 35 – WLC 351.09

1963 ZIM Chap 268 (Water Act) s 1 “normal flow” – WLC 351.16

1963 ZIM Chap 268 (Water Act) s 1 “public stream” – WLC 351.17

1963 ZIM Chap 268 (Water Act) s 1 “riparian land” – WLC 351.32

1963 ZIM Chap 268 (Water Act) s 1 “riparian owner” – WLC 351.32

1963 ZIM Chap 268 (Water Act) s 8 – WLC 351.10

1963 ZIM Chap 268 (Water Act) s 8A – WLC 351.10, WLC 351.41

1963 ZIM Chap 268 (Water Act) s 37 – WLC 351.09, WLC 351.26, WLC 351.27, WLC 351.41

1963 ZIM Chap 268 (Water Act) s 38 – WLC 351.09, WLC 351.26, WLC 351.27

1963 ZIM Chap 268 (Water Act) s 40 – WLC 351.13, WLC 351.21, WLC 351.25, WLC 351.27, WLC 351.33, WLC 351.35, WLC 351.36, WLC 351.42

1963 ZIM Chap 268 (Water Act) s 45(b) – WLC 351.35

British South Africa Co: Revision of Existing Water Rights on the Mazoe River 1960 R&N 481 – WLC 351.09

***Verlander, S v* 1975 Uys WLC 352 Z**

[WLC 352 NOTES]

Judgment Date 1975-01-30. **Court:** Rhodesian AD. **Judge(s)** THW BEADLE (Chief Justice), JVR LEWIS (Judge of Appeal)

Also reported as *S v Verlander* 1975 2 SA 376 RAD

Quick Note

Water pollution – cut grass stored in a ditch, washed away by a heavy storm, clogging up neighbour’s dam – nuisance – burden of proof on State of unreasonable use of land

Summary

For 13 years V stacked his cut grass in a water course below a dam on his farm. One year there was an unprecedented storm and his dam overflowed and swept the grass down the course into his lower neighbour’s dam, causing damage.

He was convicted under the Water Act of an “unreasonable user” of his land which caused a “nuisance” and “pollution”. On appeal –

HELD: The State failed to prove that V ought reasonably to have foreseen the damage.

Sources Noted

1963 ZIM Chap 268 (Water Act) s 1 “pollution” – WLC 352.06

1963 ZIM Chap 268 (Water Act) s 2 – WLC 352.09

1963 ZIM Chap 268 (Water Act) s 135A – WLC 352.01

1963 ZIM Chap 268 (Water Act) s 135DA – WLC 352.01

McKERRON *Law of Delict* ed 7 227 – WLC 352.08

***Van der Vyver v Minister of Water Affairs* 1975 Uys WLC 353 WC**

[WLC 353 NOTES]

Judgment Date 1975-02-11. **Court:** WC (Pretoria). **Judge(s)** AP MYBURGH.. **Case** W662A. **DWAF File** 721.

Quick Note

Expropriation of servitude of impoundment – methods of determining compensation – onus of proof

Summary

The government built a dam in a stream, the water of which would inundate at the most 11 ha of V's property above the weir. It expropriated a servitude of impoundment in respect of the 11 ha and offered V a certain amount as compensation. V refused the offer and the water court then had to determine the compensation. HELD –

The compensation is not as if all the rights of ownership – therefore the “land” – is expropriated.

The court merely has to determine the compensation for the servitude's infringement on the right of ownership, which shall not exceed a sum to make good any inconvenience or loss caused by such expropriation.

Therefore the advantages which the dam offers V and all the other riparian owners, are to be taken account of. In V's case it can increase the value of his property because it will control the floods; it will increase the certainty of water during critical times and droughts, and it will mean fewer restrictions on the permit allocations to V.

The court's duty is to determine a specific amount from the evidence. The market value of the inundated land can be of assistance in the calculation of the compensation for “inconvenience and loss” caused by the servitude. But it remains a subjective calculation.

Against that stands the provision that any enhancement in the value of land shall not be taken into account in determining the amount of compensation.

There is no onus in the determination of compensation in expropriation cases. A party who offers or demands an amount of compensation, must prove it. Therefore there cannot be an order for absolution from the instance after the dispute about the quantum of damages has been proved. Even if the expropriatee does not produce any evidence, the expropriator's offer stands.

Sources Noted

1912 Act 8 s 98 – WLC 353.49
1956 Act 54 s 1 “government water work” – WLC 353.11
1956 Act 54 s 60 – WLC 353.01, WLC 353.04
1956 Act 54 s 60(1) – WLC 353.10, WLC 353.24, WLC 353.30, WLC 353.31
1956 Act 54 s 60(3) – WLC 353.32, WLC 353.33, WLC 353.35, WLC 353.37, WLC 353.59, WLC 353.61
1956 Act 54 s 60(4) – WLC 353.02, WLC 353.51
1956 Act 54 s 60(9) – WLC 353.12, WLC 353.19, WLC 353.25
1956 Act 54 s 141(1) – WLC 353.27
1956 Act 54 s 141(2) – WLC 353.24, WLC 353.27, WLC 353.28
1956 Act 54 s 141(3) – WLC 353.04, WLC 353.26, WLC 353.27, WLC 353.28, WLC 353.29
1956 Act 54 s 141(8) – WLC 353.23, WLC 353.28
1956 Act 54 s 142 – WLC 353.25
1956 Act 54 s 145(1) – WLC 353.12, WLC 353.13
1956 Act 54 s 145(2) – WLC 353.28
1956 Act 54 s 146(2) – WLC 353.35, WLC 353.37, WLC 353.59, WLC 353.60
1956 Act 54 s 160(4) – WLC 353.36
1957 GN 135 r 5(5) (Water Court Rules) – WLC 353.54
1957 GN 135 r 11 (Water Court Rules) – WLC 353.54
1957 GN 135 r 29(3) (Water Court Rules) – WLC 353.51
1961 Act 56 s 10(a) (Water Amendment) – WLC 353.10
1965 Act 71 s 1(b) (Water Amendment) – WLC 353.59
1965 Act 71 s 1(c) (Water Amendment) – WLC 353.36
1967 Act 79 s 5 (Water Amendment) – WLC 353.33
1972 Act 45 (Water Amendment) – WLC 353.09
Bennet v Department of Agricultural Credit and Land Tenure 1974 3 SA 737 T – WLC 353.53
Breed v Van den Berg 1932 A 283 – WLC 353.22
Delmas Milling Co v Du Plessis 1955 3 SA 447 A – WLC 353.22
Garlick v Smartt (1) 1927 Uys WLC 129 A – WLC 353.50
Greyvenstein v Minister van Landbou 1970 4 SA 233 – WLC 353.53
Jacobs v Minister of Agriculture 1972 4 SA 608 W – WLC 353.49, WLC 353.56
Minister of Lands v Pretorius 1956 Uys WLC 277 A – WLC 353.18, WLC 353.19, WLC 353.21
Minister of Water Affairs v Mostert (1) 1964 Uys WLC 315 A – WLC 353.50
Pienaar v Minister van Landbou 1972 1 SA 14 A – WLC 353.56
Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 353.31
Thanam v Minister van Landbou 1970 4 SA 85 D – WLC 353.56
Van Vuuren v Minister of Water Affairs 1960 Uys WLC 295 WC – WLC 353.21, WLC 353.55
HALL CG *Water Rights in SA* – WLC 353.29

Redelinghuis v Bazzoni 1975 Uys WLC 354 T

[WLC 354 NOTES]

Judgment Date 1975-08-28. **Court:** TPD. **Judge(s)** FS STEYN

Also reported as *Redelinghuis v Bazzoni* 1976 1 SA 110 T

Quick Note

Rainwater runoff – works diverting water to neighbour's land in stead of to the street – choice of remedy – urban and rural property distinguished

Summary

The natural flow of rainwater from the stand of B would be to the street, but boundary walls with seepage holes on stand B caused the rain water on B to seep into the stand of his neighbour (R), damaging the foundations of his buildings. R sued B to compel him to remedy the situation.

The court went into the matter what procedure should be followed. B based his claim on the delictual concept of nuisance or the rectification of an injustice by the *interdictum quod vi aut clam*. He implied therefore that B, by allowing the seepage, intentionally or negligently failed his common law duty to use his property in such a way that he causes no detriment to his neighbour. B's defence was that the works were erected by his predecessor with the consent of R.

The question was therefore whether the actions of B in allowing the retaining walls with the resultant impounding of rain water, and in refraining to take measures to prevent the impounded water from seeping through to R's stand, is actionable negligence.

The court first held that the common law rules on letting natural water flow onto another's land are not applicable to urban properties. Then it held that the present stands are not "urban" in the legal sense, because they were not covered as densely as urban properties in the common law country of Holland. B is therefore not subject to the common law obligation which rests on urban properties to lead their own natural water to the adjoining street.

The rights and duties which the plaintiff and defendant have against each other are determined by the *actio aquae pluviae arcendae*. Because the interdict *quod vi aut clam* requires that the defendant should do something by stealth or force; but in this case the walls and seepage holes were not made by him.

It however held that the common law prohibition on the execution of works on higher lying land which detrimentally changes the runoff to lower lying land, applies to this case. It therefore held for the plaintiff R.

Sources Noted

Austen Bros v Standard Diamond Mining Co Ltd 1882 NC (IHCg) 363 – WLC 354.28, WLC 354.37

Barklie v Bridle 1955 Uys WLC 272 Z – WLC 354.14, WLC 354.40, WLC 354.41, WLC 354.42

Benoni Town Council v Meyer (1) 1959 Uys WLC 291 W – WLC 354.26, WLC 354.27, WLC 354.28, WLC 354.29, WLC 354.32, WLC 354.33, WLC 354.34, WLC 354.35, WLC 354.37

Benoni Town Council v Meyer (2) 1961 Uys WLC 305 W – WLC 354.17, WLC 354.32, WLC 354.33, WLC 354.34, WLC 354.38

Bishop v Humphries 1919 Uys WLC 63 W – WLC 354.20, WLC 354.21, WLC 354.22, WLC 354.25, WLC 354.33, WLC 354.40, WLC 354.42

Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 354.28, WLC 354.35

De Villiers v Galloway 1943 Uys WLC 207 A – WLC 354.60, WLC 354.61

Green v Borstel 1940 2 PH M89 W – WLC 354.25

Johannesburg Municipality v African Realty Trust 1927 A 163 – WLC 354.28, WLC 354.36

New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 354.13, WLC 354.14, WLC 354.15, WLC 354.28, WLC 354.37

Thormahlen v Gouws 1956 Uys WLC 274 A – WLC 354.49

D 8 5 8 5 – WLC 354.18

D 39 3 2 – WLC 354.17

D 39 3 1 23 – WLC 354.17

D 39 3 24 – WLC 354.17

GROTIUS 2 34 14 – WLC 354.30, WLC 354.31

GROTIUS 2 34 16 – WLC 354.30, WLC 354.31, WLC 354.41

MILLNER *Law of Delict* ASSAL 1956 204 WLC 354.41

SCHOLTENS *JE Property*, ASSAL 1956 130-6

VOET 8 12 13 – WLC 354.31

VOET 39 3 2 – WLC 354.08, WLC 354.18, WLC 354.23, WLC 354.24, WLC 354.29, WLC 354.31

VOET 39 3 4 – WLC 354.09, WLC 354.18, WLC 354.23, WLC 354.25, WLC 354.27, WLC 354.32, WLC 354.33, WLC 354.35, WLC 354.41

VOET 34 3 9 – WLC 354.28

Nel v Enyati Colliery Ltd 1976 Uys WLC 355 A

[WLC 355 NOTES]

Judgment Date 1976-03-31. **Court AD.** **Judge(s)** FLH RUMPF (Chief Justice), PJ WESSELS, EL JANSEN, WG TROLLIP, MM CORBETT (Judges of Appeal)

Also reported as *Nel v Enyati Colliery Ltd* 1976 3 SA 30 A

Quick Note

Contract to replace measured quantity of water – supply never measured – obligation impossible

Summary

A purchaser of coal rights in respect of a farm was contractually bound not to interfere with, diminish or pollute the water which is used by the land owner, and further to measure the water which flows to the homestead and to replace it with water of similar quantity and quality should the mining operations interfere with such supply. The farmer sued the mine to supply the water.

HELD: If the water was never measured, the mine is not bound to replace the water affected by the mining operations, because measurement was clearly an intended prerequisite to the positive obligation to replace the affected water.

Sources Noted

1960 GN 593 r 33(4) (Supreme Court Rules) – WLC 355.02

Van Vuren v Registrar of Deeds 1907 T 289 – WLC 355.11

Van der Merwe v Wiese 1948 4 SA 8 C – WLC 355.11

Letaba Noordkanaal Irrigation Board re Ownership of Works 1977 Uys WLC 356 WC

[WLC 356 NOTES]

Judgment Date 1977-10-11. **Court:** WC (Pretoria). **Judge(s)** CF Eloff. **Case** W694. **DWAF File** 895.

Quick Note

Irrigation board works on another's property – becomes owner of land and works

Summary

An irrigation board constructed water works on certain properties, and asked a declaratory order to define and vest its rights to the works

Held that, by the Water Act, the applicant became the owner of the works and of the land on which it was constructed.

Sources Noted

1956 Act 54 Chapter 8 – WLC 356.09

1956 Act 54 s 40 – WLC 356.09

1956 Act 54 s 40(a) – WLC 356.09

1956 Act 54 s 40(c) – WLC 356.07

1956 Act 54 s 79 – WLC 356.01

1956 Act 54 s 89(1) – WLC 356.01, WLC 356.13

1956 Act 54 s 100 – WLC 356.11

Muller's Executrix v Small Farms Ltd 1910 T 189 – WLC 356.05

Rabinowitz v De Beers Consolidated Mines Ltd 1958 3 SA 619 A – WLC 356.08

Union Government v Bolam 1927 Uys WLC 126 A – WLC 356.12

Davey v Minister of Agriculture 1978 Uys WLC 357 N

[WLC 357 NOTES]

Judgment Date 1978-08-28. **Court:** NPD. **Judge(s)** ME KUMLEBEN.

Also reported as *Davey v Minister of Agriculture* 1979 1 SA 466 N. [NOTE that the part of the judgment concerning water rights (which is the part reproduced here) does not appear in that report of the case but was quoted in the joint judgment of GvR MULLER JA, GPC KOTZÉ JA and JJ TRENGOVE JA in *Minister of Agriculture v Davey* 1981 3 SA 877 A]

Quick Note

Expropriation to construct dam – valuation of “irrigable land”

Summary

D approached the court to determine the compensation for his farm which was expropriated to construct the Albert Falls dam in the Umgeni river.

The court discussed the methods to value a water right, namely the potential to abstract water for irrigation from the Umgeni River.

The parties agreed that an application under the Water Act to the Minister to abstract water would have been successful.

‘Irrigable land’ means land which has the necessary irrigation equipment installed and in respect of which water is physically and legally available to maintain a typical crop on such land throughout the year

The area capable of being irrigated can be determined with reference to the volume of water available

A prospective buyer would allot the optimum rate for irrigated land whether or not he planned to use the water over a larger area to irrigate crops requiring less than the typical or normal quantity of water.

The valuer erroneously placed the full ‘irrigation value’ on the larger area; a prospective buyer, visualising the further development of the farm and its operation as a balanced unit, would not require more water than an amount necessary for ‘irrigation’ of suitable soils.

Sources Noted

1956 Act 54 s 62(2) – WLC 357.01

Havenga v Mare 1978 Uys WLC 358 WC

[WLC 358 NOTES]

Judgment Date 1978-11-23. **Court:** WC (Pietermaritzburg). **Judge(s)** JJF HEFER. **Case** NWH 1/78. **DWAF File** 764.

Quick Note

Unlawful impoundment and diversion of water – quantity irrelevant

Summary

M raised his existing dam without a permit and unlawfully diverted the outflow of the dam into a dry depression. H applied for an order that the M's illegal actions be stopped

M excepted that H did not state how much water H was deprived of.

HELD: that H applied for restoration of the *status quo ante*, namely the lowering of the dam and the removal of the diversion works, which were unlawful. The quantity of water affected by these unlawful actions is therefore irrelevant, and the exception was refused.

Sources Noted

1956 Act 54 s 9B – WLC 358.01
1956 Act 54 s 9 – WLC 358.01, WLC 358.07, WLC 358.10
1956 Act 54 s 10 – WLC 358.01, WLC 358.07, WLC 358.10
1963 GN 1602 r 11(4) (Water Court Rules) – WLC 358.06

***Le Roux v Richter* 1979 Uys WLC 359 T**

[WLC 359 NOTES]

Judgment Date 1979-06-13. **Court:** TPD. **Judge(s)** WJ HUMAN. **Case** I5193/77. **DWAF File** 776.

Quick Note

Water rights – misrepresentation

Summary

R cancelled a contract of sale, and evacuated the farm, due to L's material misrepresentation regarding the water rights of the farm. L sued R to honour the agreement, alleging that the farm was sold without any guarantees as to water rights

HELD: L's representation that a farm in a government water control area had, besides its scheduled rights from the canal, also unlimited pumping rights from the river (which was in fact illegal pumping which occurred with the department's knowledge), was a misrepresentation which justified respondent's claim to void it.

Therefore respondent was entitled to cancel the contract as soon as he discovered what the actual water rights situation was.

Sources Noted

1912 Act 8 s 89 – WLC 359.12
1912 Act 8 s 98 – WLC 359.12, WLC 359.31
1934 Act 46 s 9 (Irrigation Amendment) – WLC 359.12
1937 Proc 123 (Lindleyspoort Irrigation Scheme) – WLC 359.12, WLC 359.31
1956 Act 54 s 59 – WLC 359.31
1956 Act 54 s 62 – WLC 359.31
1956 Act 54 s 63 – WLC 359.31
Hepner v Roodepoort-Maraiburg Town Council 1962 4 SA 772 A – WLC 359.45
Matador Buildings Pty Ltd v Harman 1971 2 SA 21 C – WLC 359.44
Novick v Comair Holdings Ltd 1979 2 SA 116 W – WLC 359.39, WLC 359.40
Pathescope (Union) of SA Ltd v Mallinick 1927 A 292 – WLC 359.39
WEERAMANTRY Law of Contract 2 p 922 – WLC 359.44

***Weston v Minister of Water Affairs* 1979 Uys WLC 360 WC**

[WLC 360 NOTES]

Judgment Date 1979-09-27. **Court:** WC (Pietermaritzburg), **Judge(s)** DB FRIEDMAN. **Case** WC4/78. **DWAF File** 772

Quick Note

Compensation for expropriation of servitudes – market value before and after

Summary

The government expropriated a servitude of storage and aqueduct over W's farm and he applied to the water court to determine the compensation.

HELD: The difference between the market value before and after the expropriation must be determined – such determination is based on the considerations relevant to the case, and cannot be based on legal criteria: it is done by a valuation based on instinct and a feel for the market, rather than a scientific formula for determining the market value. Therefore the aesthetic considerations and the fact that the servitude implied the cutting out of the heart of the farm, which had a material impact on the value of the farm, had to be considered to determine the reduction in the land value as well as the inconvenience and losses related to the expropriation.

Sources Noted

1956 Act 54 s 60 – WLC 360.10
1965 Act 55 s 8 (Expropriation) – WLC 360.10, WLC 360.17
1965 Act 55 s 8(1) (Expropriation) – WLC 360.11, WLC 360.12
1965 Act 55 s 8(4) (Expropriation) – WLC 360.31
1965 Act 55 s 10 (Expropriation) – WLC 360.07

Mathee v Lerm
1980 Uys WLC 361 C

[WLC 361 NOTES]

Judgment Date 1980-04-21. **Court:** CPD. **Judge(s)** AP Burger.

Also reported as *Mathee v Lerm* 1980 3 SA 742 C

Quick Note

Servitude infringement – water court has jurisdiction

Summary

M claimed in the water court that L diverted water from a furrow which infringed M's servitude right to the water in the furrow.

L raised the special plea that the water court did not have jurisdiction because disputes about servitudes can only be heard by it if they are in regard to disputes about water rights.

HELD: The 1912 Irrigation Act gave jurisdiction to a water court hear and determine "disputes or claims as to water rights" but the 1956 Water Act was granted it the power to decide any claim as to the rights and duties concerning servitudes in general, and not only concerning the use of public water.

Moreover, powers exist to decide rights and duties concerning both existing and future servitudes, which include applications in connection with claims for servitudes, and are not limited to claims for servitudes.

Sources Noted

1912 Act s 32(b) – WLC 361.11

1912 Act s 34 – WLC 361.07, WLC 361.08, WLC 361.09

1956 Act s 40 – WLC 361.04, WLC 361.05, WLC 361.17

1956 Act s 40(a) – WLC 361.08, WLC 361.10, WLC 361.12, WLC 361.13, WLC 361.14, WLC 361.16, WLC 361.18

1956 Act s 40(c) – WLC 361.06, WLC 361.15, WLC 361.17

1956 Act s 43 – WLC 361.04, WLC 361.13

1956 Act s 139 – WLC 361.15, WLC 361.18

De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 361.07, WLC 361.09, WLC 361.12, WLC 361.19

Du Toit v Ackerman 1962 Uys WLC 307 A – WLC 361.15, WLC 361.17

Goosen v Kruger 1955 Uys WLC 271 E – WLC 361.19

***Stemmet v Department of Water Affairs* 1980 Uys WLC 362 NC**

[WLC 362 NOTES]

Judgment Date 1980-05-16. **Court:** NC. **Judge(s)** HR JACOBS. **DWAF File** 1153.

Quick Note

Flood water damage caused by works – no duty to prevent storm damage

Summary

The government converted natural gullies which drained storm water to the Orange River, into lined ditches with embankments. When the river rose in flood, the water pushed up in the ditches and overflowed the embankment, causing damage to S's adjoining land.

S claimed damages for constructing the ditches in such a way as to cause damage.

HELD: The defendant did not, in the circumstances, have a legal duty to prevent damage by storm water, and therefore no negligence was proven.

HELD: A clause in the plaintiff's deed of grant which exempted the defendant from liability for flood water damage, was binding even if it was never read by the plaintiff.

Sources Noted

Minister van Polisie v Ewels 1975 3 SA 590 A – WLC 362.24, WLC 362.25

Frye's Pty Ltd v Ries 1957 3 SA 575 A – WLC 362.34

***Wassung v Simmons* 1980 Uys WLC 363 N**

[WLC 363 NOTES]

Judgment Date 1980-08-15. **Court:** NPD. **Judge(s)** ME KUMLEBEN.

Also reported as *Wassung v Simmons* 1980 4 SA 753 N

Quick Note

Pipes placed in another's irrigation furrow without right or consent – claim for removal – not a dispute about water rights – supreme court (not water court) has jurisdiction

Summary

S had a pipeline servitude over the farm of W. The pipe was laid next to W's irrigation furrow. When the pipe sprung a leak, S re-laid the pipe, without the consent of W, in the furrow.

W applied to the NPD to urgently order S to remove the pipe and to restore the furrow.

S pleaded that he had a right to lay the pipe in the furrow, that it was therefore a dispute as to water rights, and that the water court and not the supreme court had exclusive jurisdiction. Secondly, that a lower owner who had a servitude right to half the water in the furrow, had to be joined as having an interest in the matter. Thirdly, that the order sought was in effect an interdict, and that W had not proved all the elements required for an interdict.

HELD: S had no servitude right or consent to lay his pipe in the furrow; therefore it was not a dispute about water rights and the water court had no jurisdiction.

HELD: S acted by force and/or stealth in laying the pipe without W's consent. The action of W was the proprietary action of an *interdictum quod vi at clam*; but since that action was not a true interdict, it was not necessary for W to prove the elements required for an interdict.

HELD: The lower owner was not entitled to lay pipes in the furrow; he could therefore not consent to the laying of the pipes by S; he therefore had no right or interest in the matter.

The court therefore granted W's application for the removal of the pipes.

Sources Noted

1956 Act 54 s 34(1)(c) – WLC 363.27
1956 Act 54 s 40(a) – WLC 363.29, WLC 363.30
1956 Act 54 s 40(c) – WLC 363.29
1956 Act 54 s 40(g) – WLC 363.29, WLC 363.31
1956 Act 54 s 43 – WLC 363.27, WLC 363.29
Amalgamated Engineering Union v Minister of Labour 1949 3 SA 637 A – WLC 363.32
Anderson v Gordik Organisation 1962 2 SA 68 D – WLC 363.32
Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 363.42
Currey v Stevens 1899-1904 NC (9HCG) 298 – WLC 363.47
Du Toit v Ackerman 1962 Uys WLC 307 A – WLC 363.29
Fourie v Uys 1957 2 SA 125 C – WLC 363.50
Garden's Estate Ltd v Lewis 1920 A 144 – WLC 363.24
Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 2 SA 151 O – WLC 363.32
London and SA Exploration Co v Rouliot 1890-1 C (8SC) 74 – WLC 363.21
Meyer v Keyser 1980 3 SA 504 D – WLC 363.46
Muller's Executrix v Small Farms Ltd – WLC 363.33
Setlogelo v Setlogelo 1914 A 221 – WLC 363.38, WLC 363.49
Texas Co (SA) Ltd v Cape Town Municipality 1926 A 467 – WLC 363.42
Thormahlen v Gouws 1956 Uys WLC 274 A – WLC 363.42, WLC 363.44
Town Council of Roodepoort-Maraaisburg v Posse Property (Pty) Ltd 1932 W 78 – WLC 363.50
Transvaal Property & Investment Co Ltd v SA Townships Mining & Finance Corp Ltd 1938 T 512 – WLC 363.50
Van Rensburg v Taute 1974 Uys WLC 350 A – WLC 363.29
ACTA JURIDICA 1962 15 Van Warmelo – WLC 363.41
ACTA JURIDICA 1969 123 JRL Milton – WLC 363.39
CHRISTINAEUS *Decisiones* 4 146 – WLC 363.42
CUJACIUS *Opera* 5 805, 807 – WLC 363.42
D 39 3 4 2 – WLC 363.42
D 43 24 1 1 – WLC 363.42
D 43 24 1 4-9 – WLC 363.42
D 43 24 4 – WLC 363.42
D 43 24 7 5 – WLC 363.42
D 43 24 8 – WLC 363.42
D 43 24 9 3 – WLC 363.42
D 43 24 11 4 – WLC 363.42
D 43 24 15 7-12 – WLC 363.42
DONNELLUS *De Jure Civili* 4 15 3.3 – WLC 363.42
HOLL CONS 3(2) 97 – WLC 363.42
HUBER U *Heedendaegse Rechtsgeleertheit* 5 9 [1] – WLC 363.42
HUBER U *Heedendaegse Rechtsgeleertheit* 2 4 36 15 – WLC 363.40
HUBER U *Praelectiones ad D* 43 24 – WLC 363.42
MILTON JRL *Law of Neighbours in South Africa*, in ACTA JURIDICA 1969 123 – WLC 363.39, WLC 363.46
VAN DER MERWE CG *Sakereg* on p 388 – WLC 363.51
VAN WARMELO *Interdictum quod vi aut clam*, in ACTA JURIDICA 1962 15 – WLC 363.41
VOET 8 4 16 – WLC 363.22
VOET 39 3 – WLC 363.42
VOET 43 24 – WLC 363.42
WASSENAAR *Practyck Judicieel* 1 46 1 – WLC 363.42
WILLE G *Principles of South African Law* ed 6 201, 203 – WLC 363.47
WINDSCHEID *Lehrbuch* 2 465 2 – WLC 363.42

***De Vries v Minister of Forestry* 1980 Uys WLC 364 C**

[WLC 364 NOTES]

Judgment Date 1980-09-09. **Court:** CPD. **Judge(s)** JJ FAGAN.

Also reported as *De Vries v Minister van Bosbou en Andere* 1980 4 SA 627 C

Quick Note

Application for water from State forest – procedure

Summary

The State refused to grant V a permit to divert water from a river in a neighbouring State forest, and lead it to his farm in a pipe. V then applied to court, claiming that his farm is entitled to the water of that river because it is a subdivision of farm riparian to that river.

The State objected that in terms of the Forest Act, V had no “existing right to use the water of a State forest” without a permit; and further, that the State may grant such permit only if V gets the approval of Parliament.

HELD: V’s farm did indeed have rights to the normal flow and the surplus water in the river. But such rights do not include the right to lead the water over someone else’s land: a right to dam and lead the water over another’s land could, apart from prescription or agreement, only be acquired by applying to the water court.

No application was however possible since the commencement of the 1941 Forest Act, which provided that no servitude or any other right may be granted in connection with a State forest except by resolution of both houses of Parliament.

V’s farm also had no “existing right” in 1941 to lead water over the land which then became the State forest, because V’s predecessors made no such application before 1941.

The State’s objection was therefore upheld.

Sources Noted

1912 Act 8 s 2 “riparian land” – WLC 364.12

1912 Act 8 s 32(g) – WLC 364.13, WLC 364.14

1912 Act 8 s 10 – WLC 364.16

1912 Act 8 s 101 – WLC 364.13, WLC 364.14

1941 Act 13 s 10 (Forest) – WLC 364.11, WLC 364.14, WLC 364.15

1956 Act 54 s 1 “riparian land” – WLC 364.12

1956 Act 54 s 40 – WLC 364.07

1956 Act 54 s 40(f) – WLC 364.13, WLC 364.14

1956 Act 54 s 43 – WLC 364.07

1956 Act 54 s 140(1) – WLC 364.13, WLC 364.14

1968 Act 72 s 7A (Forest) – WLC 364.03

1968 Act 72 s 9 (Forest) – WLC 364.04, WLC 364.05, WLC 364.08, WLC 364.09, WLC 364.14, WLC 364.15, WLC 364.19, WLC 364.20, WLC 364.22

1972 GG 3645 r 4 (Forestry Regulations) – WLC 364.10

Transvaal United Trust & Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 364.12

Sneeuwig Landgoed Edms Bpk re Water on Non-riparian Land 1980 Uys WLC 365 WC

[WLC 365 NOTES]

Judgment Date 1980-12-11. **Court:** WC (Cape Town). **Judge(s)** AP BURGER. **Case** W6/80. **DWAF File** 1157.

Quick Note

Water storage and use on non-riparian land – water court’s jurisdiction

Summary

S applied to the water court for leave to store and use for irrigation the public water to which they were entitled as riparian owners, on non-riparian land.

HELD: Although the water court did not have power to authorize storage, it could authorize use.

A rule nisi was thus granted (and confirmed later) to allow S to use a certain volume of water on non-riparian land, in respect of which certain of their properties had scheduled rights from a water scheme.

Sources Noted

1956 Act 54 s 9 – WLC 365.02

1956 Act 54 s 10 – WLC 365.02

1956 Act 54 s 11 – WLC 365.03, WLC 365.05

1956 Act 54 s 11(2) – WLC 365.02

Tecklenburg v Minister of Environmental Affairs 1984 Uys WLC 366 WC

[WLC 366 NOTES]

Judgment Date 1984-08-06. **Court:** WC (Pretoria). **Judge(s)** AP MYBURGH (Acting Judge). **Cases** W725/82, W727/82, W728/82, W730/82. **DWAF File** 1189.

Quick Note

Permission to temporarily use more water than allocated – extension permit – conditions for issuing.

Summary

T, whose farm was in the N’Komati River Government Control Area, applied to the Minister for a so-called “B-permit” (extension permit) to increase his abstraction rights from the Komati river. The Minister refused the application and T appealed to the water court.

HELD: To determine a farm’s share of the normal flow, the court must, amongst others, consider the “comparative extents of irrigable land on the respective pieces of land”. That means it has to determine (1) the area which competes with the other farms, and (2) the percentage of the land which can be economically irrigated with the available water.

HELD: Whereas in this case the water of the river had previously been apportioned equally between the control area's farms which lie within the RSA and those within Kangwane – the reason being that both areas had an equal quantity of irrigable land – but whereas 90% of the irrigable land in Kangwane was not irrigated; and whereas a water right which is not used is not lost; therefore permits could and should in the meantime be issued to those farms which do irrigate their land and need the water.

T's appeal therefore succeeded.

Sources Noted

1956 Act 54 Chapter 4 – WLC 366.12
1956 Act 54 s 9 – WLC 366.05
1956 Act 54 s 10 – WLC 366.05
1956 Act 54 s 40 – WLC 366.12
1956 Act 54 s 40(b) – WLC 366.12
1956 Act 54 s 52 – WLC 366.06
1956 Act 54 s 59 – WLC 366.03
1956 Act 54 s 62 – WLC 366.03, WLC 366.04
1956 Act 54 s 62(1) – WLC 366.05, WLC 366.14, WLC 366.14
1956 Act 54 s 62(2) – WLC 366.10, WLC 366.14
1956 Act 54 s 62(2)bis – WLC 366.02, WLC 366.10, WLC 366.11
1956 Act 54 s 62(8) – WLC 366.02, WLC 366.09

***Le Roux v Kruger* 1985 Uys WLC 367 WC**

[WLC 367 NOTES]

Judgment Date 1985-06-14. **Court:** WC (Cape Town), **Judge(s)** AP BURGER.

Also reported as *Le Roux v Kruger* 1986 1 SA 327 C [incorrectly reported as a CPD case and not as a Water Court case – see *Kruger v Le Roux* 1986 Uys WLC 370 A (below)]

Quick Note

Public stream – tributaries – private tributary, even though constituting a source of a public mainstream, does not contain public water until it reaches the public stream

Summary

The water court was asked to merely decide whether the H stream was a public stream or not. Thereafter the parties would themselves be able to settle a certain dispute concerning the water.

The stream arises on farm V where it branches into 2 streams. The left stream flows over farms W and R and the right stream flows only over farm R before they join again.

One party said that the H stream is a public stream because it complies with the definition in the Water Act of a “public stream” in that it flows over more than 1 originally granted farm and can be used for irrigation on at least 2 of such farms.

The other party said that the left stream was not a natural course; that there was no economically irrigable soil on farm V; and that the (right) stream did therefore not flow over more than 1 irrigable original farm.

After hearing the evidence and an inspection in loco –

HELD: The left stream was a natural course; there were about 6 ha of irrigable land on farm V which may be an economic unit for growing apples; therefore the H stream was a “public stream”.

On the argument that the H stream was a source of the RS river and that, as a source-tributary of a public stream, it is deemed to be a public stream –

HELD: The water of a private stream which is a source and a tributary of a public stream, only becomes public water when it joins the public stream.

Sources Noted

1906 CAPE Act 32 s 1 “perennial stream” – WLC 367.18
1912 Act 8 s 2 “public stream” – WLC 367.18, WLC 367.31
1912 Act 8 s 8 – WLC 367.32, WLC 367.66
1912 Act 8 s 8(1) – WLC 367.43
1912 Act 8 s 9 – WLC 367.31, WLC 367.43
1956 Act 54 s 1 “public stream” – WLC 367.18, WLC 367.30, WLC 367.37
1956 Act 54 s 1 “private water” – WLC 367.30
1956 Act 54 s 1 “public water” – WLC 367.30
1956 Act 54 s 5 – WLC 367.35, WLC 367.66
1956 Act 54 s 52(1) – WLC 367.89
1956 Act 54 s 89(1) – WLC 367.33
Allen v Tamsen 1932 Uys WLC 167 WC – WLC 367.16
Bon Accord Irrigation Board v Pretoria Municipality (2) 1921 Uys WLC 86 WC – WLC 367.16
Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 367.47
Dreyer v Ireland 1874 C (4B) 193 – WLC 367.67
Du Toit v Krige 1971 Uys WLC 340 WC – WLC 367.22, WLC 367.24, WLC 367.26, WLC 367.87, WLC 367.91, WLC 367.96
Erasmus v De Wet 1874 C (4 Buch) 204 – WLC 367.62, WLC 367.64, WLC 367.67, WLC 367.74
Hough v Van der Merwe 1874 C (4 Buch) 148 – WLC 367.65, WLC 367.67, WLC 367.69
Kirstein re Zendeling Spruit 1917 Uys WLC 53 WC – WLC 367.48
Pretorius v Lategan's Estate 1944 Uys WLC 213 WC – WLC 367.11
Rabie v De Wet (1) 1951 Uys WLC 247 WC – WLC 367.63

Rabie v De Wet (2) 1951 Uys WLC 249 WC – WLC 367.63
Rabie v De Wet (3) 1952 Uys WLC 254 WC – WLC 367.63
Rabie v Erasmus 1952 Uys WLC 251 WC – WLC 367.63
Retief v Louw 1874 C (4 Buch) 165 – WLC 367.57, WLC 367.60, WLC 367.67, WLC 367.74
Somerset West Municipality and Cape Explosives Works Ltd 1936 Uys WLC 186 WC – WLC 367.24, WLC 367.26, WLC 367.52, WLC 367.83, WLC 367.92, WLC 367.96
Struben v Certain Riparian Owners (1) 1948 Uys WLC 231 WC – WLC 367.26, WLC 367.52, WLC 367.78, WLC 367.79
Taute v Janse van Rensburg 1973 Uys WLC 346 WC – WLC 367.25, WLC 367.27, WLC 367.95, WLC 367.96
Transvaal United Trust and Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 367.38, WLC 367.49, WLC 367.50
Van Heerden v Weise 1880 A (1 BAC) 5 – WLC 367.17, WLC 367.52, WLC 367.57, WLC 367.64, WLC 367.70, WLC 367.71, WLC 367.72, WLC 367.75, WLC 367.76, WLC 367.78, WLC 367.80, WLC 367.96, WLC 367.97, WLC 367.98
Van Rensburg v Taute 1974 Uys WLC 350 A – WLC 367.95
Vermaak v Palmer 1876 C (6 Buch) 25 WLC 367.66, WLC 367.67, WLC 367.68, WLC 367.69, WLC 367.70, WLC 367.74
 ANGELL *Watercourses* – WLC 367.65
 D 43 12 – WLC 367.61
 D 43 20 1 8 – WLC 367.38
 DE VILLIERS JER *Water Law 1: The 8th section [of Act 8 of 1912]*, SALJ 1920 37 247 – WLC 367.76, WLC 367.78, WLC 367.83
 DE VILLIERS JER *Water Law 3: The 8th section again: public streams*, in SALJ 1921 38 13 – WLC 367.42, WLC 367.43, WLC 367.77, WLC 367.96, WLC 367.98
 DE VILLIERS JER *Water Law 4: Sections 8-10: The normal flow*, SALJ 1921 38 121 – WLC 367.96
 DE VILLIERS JER *Water Law 7: Tributaries*, in SALJ 1921 38 389 – WLC 367.45, WLC 367.54, WLC 367.87, WLC 367.96, WLC 367.100
 HALL CG *Water Rights in SA* – WLC 367.46
 HALL CG *Water Rights in SA* ed 3 p 4 – WLC 367.65
 VAN LEEUWEN S *Censura forensis* 1 2 1 6 – WLC 367.60
 VOET 8 3 6 – WLC 367.60, WLC 367.68

***GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality (1)* 1986 Uys WLC 368 O**

[WLC 368 NOTES]

Judgment Date 1986-06-26. **Court:** OPD. **Judge(s)** EKW LICHTENBERG.

Also reported as *GJO Boerdery Ondernemings (Edms) Bpk v Bloemfontein Munisipaliteit* 1987 2 SA 678 O

Quick Note

Servitude of impoundment – water dammed on riparian owner’s land – owner’s right to normal flow retained – but may not take it from dam

Summary

G was the owner of riparian land on the right bank of the M river. Part of his land was inundated by the water held back by a weir built by the B municipality over the river in 1904. The weir was raised several times and 3 servitudes of inundation and storage were registered by agreement between B and the predecessors of G.

G claimed the right to extract water from the dam, on the ground that as a riparian owner he had the right to take a share of the normal flow of the river; that the servitudes did not take this right away from him; that it was impossible for him to extract the water elsewhere; that B had only expropriated the right to inundate G’s property and not his right to the normal flow; and that if B had indirectly acquired such right, it had never paid or offered compensation for it. B therefore claimed the right to extract water from the dam or R460000 compensation.

B admitted G’s right to use the river water for irrigation purposes except that G may not extract more water than he was entitled to before the weir was erected. B also excepted that G may not take his water from the stored water in B’s dam because the 3 servitudes in effect prohibited it.

HELD: The servitudes did not take away G’s right to the normal flow, but G failed to prove what the quantity of that normal flow was.

HELD: G may not store his normal flow in B’s dam and may therefore not extract water from B’s dam.

[The judgment was reversed on appeal: see *GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality* 1988 Uys WLC 373 A (below)]

Sources Noted

1896 OFS Act 19 s 13 – WLC 368.45
 1896 OFS Act 19 s 1 – WLC 368.28
 1913 OFS Ord 4 s 156-8 (Local Government) – WLC 368.32
 1912 Act 8 s 9-14 – WLC 368.33
 1912 Act 8 s 11(2) – WLC 368.19
 1912 Act 8 s 12 – WLC 368.19
 1912 Act 8 s 104 – WLC 368.10, WLC 368.59, WLC 368.61, WLC 368.62
 1912 Act 8 s 104(1) – WLC 368.60
 1912 Act 8 s 104(3) – WLC 368.60, WLC 368.61, WLC 368.62, WLC 368.63, WLC 368.64, WLC 368.65, WLC 368.66
 1934 Act 46 s 12 (Water Amendment) – WLC 368.61
 1956 Act 54 s 1 “normal flow” – WLC 368.38, WLC 368.49
 1956 Act 54 s 1 “surplus water” – WLC 368.40, WLC 368.44
 1956 Act 54 s 1 “use for agricultural purposes” – WLC 368.45
 1956 Act 54 s 9 – WLC 368.42, WLC 368.44
 1956 Act 54 s 9(2) – WLC 368.40
 1956 Act 54 s 10 – WLC 368.42, WLC 368.44
 1956 Act 54 s 10(1) – WLC 368.43
 1956 Act 54 s 53(2) – WLC 368.40

1956 Act 54 s 139 – WLC 368.54
 1956 Act 54 s 141(6) – WLC 368.36, WLC 368.47
 1975 Act 63 s 12(1) (Expropriation) – WLC 368.07
 1975 Act 63 s 15 (Expropriation) – WLC 368.07
 1975 Act 63 s 10(4) (Expropriation) – WLC 368.08
Colonial Government v Logan 1903 C (20SC) 343 PC – WLC 368.47
Pieterse v Du Plessis 1971 Uys WLC 338 A – WLC 368.53
Richter v Bloemfontein Town Council (1) 1921 Uys WLC 72 O – WLC 368.16
Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 368.16, WLC 368.17, WLC 368.18, WLC 368.19, WLC 368.20, WLC 368.23, WLC 368.27, WLC 368.28
Standerton Municipality v Smit 1957 Uys WLC 283 WC – WLC 368.47
Viljoen v SA Railways and Harbours 1967 Uys WLC 322 WC – WLC 368.52
Wagenaar v Du Plessis (1) 1930 Uys WLC 155 A – WLC 368.44

***Transvaal Canoe Union v Butgereit* 1986 Uys WLC 369 T**

[WLC 369 NOTES]

Judgment Date 1986-06-26. **Court:** TPD. **Judge(s)** CF ELOFF (Deputy Judge President)

Also reported as *Transvaal Canoe Union and Another v Butgereit and Another* 1986 4 SA 207 T

Quick Note

Public river – Right to canoe on – not trespassing on riparian owner’s land even if his boundary is the middle of the river – “navigability” not as in Roman-Dutch Law.

Summary

B was the owner of riparian land, her boundary being the middle of the river. In her opinion canoeists were trespassing on her property when they paddled on her side of the stream, and she tried to stop them by force. The Canoe Union then applied to the TPD for a declaration that they were entitled to do paddle on the whole stream. That court HELD that the common law allowed navigation on public rivers; that this was a public river; that “navigation” in South Africa did not mean the same as in Holland but included rivers where only small craft such as canoes could pass. On appeal to the AD:

HELD: The common law made special provision for commercially navigable streams but did not limit the public’s right to use the water of public streams for such activities as were possible in the river, such as boating, swimming and fishing.

HELD: The judgment in confirmed

Sources Noted

1927 Act 9 (Land Survey) – WLC 369.44
 1935 Act 21 (Seashore) – WLC 369.44
 1956 Act 54 s 1 “public water” – WLC 369.17
 1956 Act 54 s 164bis – WLC 369.40
 1965 GN 48 r 14 (Rules of the Supreme Court) – WLC 369.11
Lange v Minister of Lands 1957 1 SA 297 A – WLC 369.39
Van Niekerk & Union Government (Minister of Lands) v Carter 1917 A 359 – WLC 369.20, WLC 369.25, WLC 369.35, WLC 369.39
 D 39 3 10 2 – WLC 369.23
 D 43 12 1 2, 3 – WLC 369.20
 D 43 12 2 – WLC 369.24
 FEUDS 2 56 – WLC 369.25
 GROTIUS *Inleidinge* 2 1 25 – WLC 369.29
 HUBER U *Jurisprudence of my time* 1 2 1 16, 17, 19 – WLC 369.31, WLC 369.37
 VAN DER KESSEL DG *Lectures on GROTIUS’ Inleidinge* 2 1 25 – WLC 369.33
 VAN LEEUWEN S *Roman-Dutch Law* 2 1 12 – WLC 369.32
 VOET 1 8 8 – WLC 369.30, WLC 369.37
 VOET 43 12 – WLC 369.26, WLC 369.27
 VOET 43 14 – WLC 369.26, WLC 369.28

***Kruger v Le Roux* 1986 Uys WLC 370 A**

[WLC 370 NOTES]

Judgment Date 1986-11-28. **Court:** AD. **Judge(s)** G VILJOEN, AS BOTHA, EM GROSSKOPF, JW

SMALBERGER (Judges of Appeal), WG BOSHOFF (Acting Judge of Appeal)

Also reported as *Kruger v Le Roux* 1987 1 SA 866 A

Quick Note

Appeal from final judgment of water court – directly to appellate division

Summary

R alleged that in 1941 the predecessors of the present riparian owners orally agreed to divide the water of the Hugenoot stream; that water was to be abstracted from the stream on K’s land; that it be lead over K’s land in a servitude furrow to R’s land; that K knew of the existence of the agreement when he bought his land; and that R is therefore entitled to enforce the agreement against K.

In the alternative, R alleged that he and his predecessors had been receiving the water in the above manner for an uninterrupted period of more than 30 years *nec clam nec vi nec precario*; and he had accordingly acquired by prescription the right to such use. K denied R's rights and R accordingly applied to the water court to enforce them, alternatively for an apportionment of the river's water.

K pleaded that the water was private water and/or that the stream fell within a government water control area and that the water court had no jurisdiction to apportion the water.

The water court decided only the first point, and held that it was a public stream. Against this decision K appealed directly to the AD.

K's argument before the AD was that the water court's decision was merely of a preliminary point, on which depended the continuation of the trial on the main issue; and that the order and the costs order was not appealable because it was not a final order. Furthermore, that leave to appeal was not obtained.

HELD: It is not necessary to obtain the leave of any court to appeal against a water court order.

HELD: The costs order against K was appealable because it was a simple interlocutory order and therefore final, irrespective what the outcome of the main dispute was.

But HELD: The water court judge should not have made a costs order at that stage. Accordingly the water court's costs order was amended by reserving the costs of the point of dispute (about the water being public) be held over for decision at the conclusion of the litigation.

Sources Noted

1917 Act 32 s 80(b) (Magistrates Courts) – WLC 370.17
1944 Act 32 s 83(b) (Magistrates Courts) – WLC 370.17
1956 Act 54 s 40(b) – WLC 370.04, WLC 370.05
1956 Act 54 s 49(1) – WLC 370.08, WLC 370.12, WLC 370.13, WLC 370.18, WLC 370.24
1956 Act 54 s 49(2) – WLC 370.19, WLC 370.22, WLC 370.23, WLC 370.24
1956 Act 54 s 49(4) – WLC 370.24
1956 Act 54 s 51 – WLC 370.04
1956 Act 54 s 62 – WLC 370.26
1959 Act 59 s 20(2) (Supreme Court) – WLC 370.17, WLC 370.18, WLC 370.22, WLC 370.23, WLC 370.24
1959 Act 59 s 20(4) (Supreme Court) – WLC 370.23
Botha v AA Mutual Insurance Association Ltd 1968 4 SA 485 A – WLC 370.10
Bruyns, R v 1899 C (16 SC) 378 – WLC 370.20
Constantia Insurance Co Ltd v Nohamba 1986 3 SA 27 A – WLC 370.10
Du Toit v Ackerman 1962 Uys WLC 307 A – WLC 370.13, WLC 370.16, WLC 370.18, WLC 370.22
Erasmus v Daly & Co 1912 T 465 – WLC 370.16
Firestone South Africa (Pty) Ltd v Genticro AG 1977 4 SA 298 A – WLC 370.11
Heyman v Yorkshire Insurance Co Ltd 1964 1 SA 487 A – WLC 370.10
Jackson v Smith 1928 T 580 – WLC 370.20
Le Roux v Kruger 1985 Uys WLC 367 WC – WLC 370.06
Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 1 SA 839 A – WLC 370.14
Smit v Oosthuizen 1979 3 SA 1079 A – WLC 370.13
South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 3 SA 534 A – WLC 370.13, WLC 370.14
Vermeulen v Vermeulen 1939 O 199 – WLC 370.20
Warner v Reid 1907 T 306 – WLC 370.16, WLC 370.22

***Minister of Water Affairs v Van der Berg* 1987 Uys WLC 371 WC**

[WLC 371 NOTES]

Judgment Date 1987-08-28. **Court:** WC. **Judge(s)** PJ VAN DER WALT. **Case** W749/85. **DWAF File** 1200.

Quick Note

Water court order – contempt – water court has no jurisdiction to sentence offender

Summary

M applied to the water court for an order for B's imprisonment for contempt of court for failing to comply with a previous water court order.

B's defence was that the water court does not have jurisdiction to issue a contempt of court order.

HELD: The Water Act authorises a water court to convict someone for contempt of court for something committed in court, but not for something which occurred outside the court, such as non-compliance with a water court order. The latter is an offence which can be prosecuted in a magistrates' court, but a water court has no jurisdiction to hear such a criminal case, nor to issue a contempt order for such non-compliance.

Sources Noted

1912 Act 8 s 38 – WLC 371.09, WLC 371.10, WLC 371.12, WLC 371.13, WLC 371.29
1912 Act 8 s 133(3) – WLC 371.11, WLC 371.12, WLC 371.13
1944 Act 30 s 8 (Irrigation Amendment) – WLC 371.10, WLC 371.12, WLC 371.29
1944 Act 30 s 10 (Irrigation Amendment) – WLC 371.11
1944 Act 32 s 65A (Magistrates' Courts) – WLC 371.24
1944 Act 32 s 108 (Magistrates' Courts) – WLC 371.24
1956 Act 54 s 40 – WLC 371.08, WLC 371.25
1956 Act 54 s 43 – WLC 371.08, WLC 371.25
1956 Act 54 s 48(1) – WLC 371.13, WLC 371.26

1956 Act 54 s 48(3) – WLC 371.04, WLC 371.06, WLC 371.13, WLC 371.14, WLC 371.16, WLC 371.25, WLC 371.28, WLC 371.30, WLC 371.31, WLC 371.34
 1956 Act 54 s 54 – WLC 371.21
 1956 Act 54 s 55 – WLC 371.22
 1956 Act 54 s 170(6) – WLC 371.14, WLC 371.16
 1963 GN 1603 r 35 (Water Court Rules) – WLC 371.02, WLC 371.04, WLC 371.17, WLC 371.20, WLC 371.23
 1963 GN 1603 r 17 (Water Court Rules) – WLC 371.02
 1977 Act 108 s 7(b) (Water Amendment) – WLC 371.13
 HALL CG *Water Rights in SA* ed 2 116 – WLC 371.12
 STEYN LC *Uitleg van Wette* – WLC 371.15

Butgereit v Transvaal Canoe Union 1987 Uys WLC 372 A

[WLC 372 NOTES]

Judgment Date 1987-11-30. **Court:** AD. **Judge(s)** PJ RABIE (Acting Chief Justice) CP JOUBERT, HJO VAN HEERDEN, EM GROSSKOPF and HH NESTADT (Judges of Appeal)

Also reported as *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 A

Quick Note

Canoeing allowed on public rivers – not limited to “navigable” rivers.

Summary

B was the owner of riparian land, her boundary being the middle of the river. In her opinion canoeists were trespassing on her property when they paddled on her side of the stream, and she tried to stop them by force. The Canoe Union then applied to the TPD for a declaration that they were entitled to do paddle on the whole stream. That court HELD that the common law allowed navigation on public rivers; that this was a public river; that “navigation” in South Africa did not mean the same as in Holland but included rivers where only small craft such as canoes could pass. On appeal to the AD:

HELD: The common law made special provision for commercially navigable streams; but this did not limit the public’s right to use the water of public streams for such activities as were possible in the river, such as boating, swimming and fishing.

HELD: The judgment in *Transvaal Canoe Union v Butgereit* 1986 Uys WLC 369 T (below) confirmed, and appeal dismissed.

Sources Noted

1956 Act 54 s 1 “public stream” – WLC 372.04
 1956 Act 54 s 164bis(1) – WLC 372.09, WLC 372.45
 1983 TRANSVAAL Ord 12 Chapter 6 (s 67-85) (Nature Conservation) – WLC 372.48
 1983 TRANSVAAL Ord 12 s 1 “waters” (Nature Conservation) – WLC 372.11
 1983 TRANSVAAL Ord 12 s 75 (Nature Conservation) – WLC 372.10, WLC 372.12, WLC 372.47, WLC 372.48
 1983 TRANSVAAL Ord 12 s 106(1)(c) Nature Conservation) – WLC 372.10, WLC 372.12, WLC 372.47, WLC 372.48
 1983 TRANSVAAL Ord 12 s 107 (Nature Conservation) – WLC 372.10, WLC 372.12, WLC 372.47, WLC 372.48
Lange v Minister of Lands 1957 1 SA 297 A – WLC 372.08
Surveyor-General (Cape) v Estate De Villiers 1923 A 588 – WLC 372.26
Transvaal Canoe Union v Butgereit 1986 Uys WLC 369 T – WLC 372.01, WLC 372.02, WLC 372.36
Van Niekerk & Union Government v Carter 1917 A 359 – WLC 372.07, WLC 372.08, WLC 372.15, WLC 372.16, WLC 372.25, WLC 372.34
BORT Tractaet van de Domeynen van Hollandt 5 2, – WLC 372.27, WLC 372.35
 D 1 8 1 pr – WLC 372.18
 D 12 1 1 – WLC 372.13
 D 39 3 10 2 – WLC 372.06, WLC 372.20, WLC 372.36
 D 43 12 1 2 – WLC 372.14, WLC 372.15
 D 43 12 1 3 – WLC 372.15
 D 43 12 1 4 – WLC 372.14
 D 43 12 2 – WLC 372.06, WLC 372.19, WLC 372.36
 D 43 12 3 – WLC 372.14, WLC 372.17
 D 43 13 1 2 – WLC 372.16
 D 43 20 1 41, 42 – WLC 372.19
 D 50 16 5 – WLC 372.18
 FEUDS 2 56 – WLC 372.07, WLC 372.25, WLC 372.26, WLC 372.34
 GROENEWEGEN *De Legibus Abrogatis* ad Inst 2 1 2 – WLC 372.22, WLC 372.23
 GROTIUS *Inleidinge* 2 1 25 – WLC 372.05, WLC 372.07, WLC 372.24, WLC 372.34
 GROTIUS *Inleidinge* 2 1 26 – WLC 372.27
 GROTIUS *Inleidinge* 2 1 28 – WLC 372.27
 HEINECCIUS *Elementa Juris Civilis* 2 1 325 – WLC 372.29
 HORACE 3 7 28; 3 12 6 – WLC 372.38
 HUBER U *Jurisprudence of my time* 1 2 1 16, 17 and 19 – WLC 372.05
 INST 2 1 2 – WLC 372.21
 INST 2 1 4 – WLC 372.21
 PLINY *Epistolae* 8 8 – WLC 372.38
 PROPERTIUS 1 11 – WLC 372.38
 SUETONIUS *Augustus* 83 – WLC 372.38
 VAN DER KEESSEL DG *Lectures on GROTIUS’ Inleidinge* 2 1 6 – WLC 372.21
 VAN DER KEESSEL DG *Lectures on GROTIUS’ Inleidinge* 2 1 25 – WLC 372.05
 VAN LEEUWEN S *Roman-Dutch Law* 2 1 12 – WLC 372.05

GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality (2) 1988 Uys WLC 373 A

[WLC 373 NOTES]

Judgment Date 1988-05-27. **Court:** AD. **Judge(s)** PJ RABIE (Acting Chief Justice),
EL JANSEN, GG HOEXTER, EM GROSSKOPF, W VIVIER (Judges of Appeal).

Also reported as *GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Munisipaliteit* 1988 4 SA 75 A

Quick Note

Servitude of storage – not limiting riparian owner’s water rights to river water – may extract water from servitude holder’s dam inundating his property – water rights expropriated – compensation.

Summary

In 1904 B built a weir in the Modder river for the purpose of water supply to the city of Bloemfontein and G’s land above the weir was made subject to servitudes of water storage. When B expropriated G’s water rights, G claimed compensation, but B refused, alleging that as a result of the servitudes, G may in any case not abstract water from the stored water in the river.

G claimed in the OPD to be entitled to the river’s surplus water, and that such water was stored in the dam; therefore he may extract his water from the dam. That court held that the water in the dam belonged to B and that G may not abstract water from the dam – *GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Munisipaliteit* 1987 2 SA 678 O [1986 WLC 368 O]. G appealed to the AD.

HELD: The servitudes of storage gave B only the right to occupy G’s land by submerging, and did not imply that G lost any water rights. A riparian owner may abstract the water to which he is entitled anywhere on his property, and this right was not specifically excluded by the servitudes. Therefore G’s water rights were not affected, and B has to pay compensation for their expropriation.

The decision of the OPD (above) was therefore reversed.

Sources Noted

1896 OFS Act 19 s 1 – WLC 373.01, WLC 373.02

1912 Act 8 Chapter 7 – WLC 373.32

1912 Act 8 s 9 – WLC 373.17

1912 Act 8 s 104(1) – WLC 373.27, WLC 373.28, WLC 373.32, WLC 373.33

1912 Act 8 s 104(3) – WLC 373.31

1956 Act 54 s 1 “normal stream” – WLC 373.15

1956 Act 54 s 6(1) – WLC 373.17

1956 Act 54 s 9(2) – WLC 373.16

1962 OFS Ord 8 s 76 (Local Government) – WLC 373.10

1975 Act 63 (Expropriation) – WLC 373.11

GJO Boerdery Ondernemings Edms Bpk v Bloemfontein Municipality (1) 1986 Uys WLC 368 O – WLC 373.13

Richter v Bloemfontein Town Council (2) 1921 Uys WLC 87 A – WLC 373.23, WLC 373.25

DE VILLIERS JER *Water Law 6: Sections 8-10: The normal flow*, SALJ 1921 38 261 – WLC 373.20

Cogmanskloof Irrigation Board v Land and Agricultural Bank of SA 1989 Uys WLC 374 C

[WLC 374 NOTES]

Judgment Date 1989-09-21. **Court:** Cape CPD. **Judge(s)** IG FARLAM (Acting Judge)

Also reported as *Cogmanskloof Irrigation Board v Land and Agricultural Bank of SA* 1990 3 SA 126 C

Quick Note

Irrigation board rates – debtor sequestrated – property attached and sold for Land Bank’s mortgage loan – Land bank not liable for arrear rates – but buyer is liable.

Summary

H owned 4 farms in the Cogmanskloof irrigation district (Montagu), of which 100 hectares were included in the irrigation schedule of the Cogmanskloof Irrigation Board (CIB).

CIB levied rates and interest on the scheduled hectares and when H failed to pay his rates, CIB had him sequestrated and proved a claim in his insolvent estate.

But the Land Bank, which had a mortgage on the property, attached and sold the farms in terms of the Land Bank Act. The proceeds were insufficient to settle even the Land Bank loan, and CIB then claimed the arrear rates and interest from the Land Bank (1st defendant) and the trustee of the insolvent estate (2nd defendant).

The matter was brought to court to determine the ranking in preference of an irrigation board’s rates and the Land Bank’s mortgage loan.

HELD: The Land Bank was not obliged to pay the irrigation board’s claim from the proceeds of the sale.

HELD: A charge on the land for unpaid irrigation board rates and interest remained, even when the land is sold and transferred: the new owner (the Land Bank itself in this case) is therefore liable for irrigation board rates and interest which were unpaid at date of transfer.

HELD: After attachment of land and noting thereof by the registrar of deeds, the irrigation board was not entitled to levy rates on the land without written consent of the Land Bank.

[The judgment was confirmed on appeal: see *Land and Agricultural Bank of SA v Cogmanskloof IB* 1991 Uys WLC 378 A]

Sources Noted

1912 Act 8 s 93 – WLC 374.16
1912 Act 8 s 70(4) – WLC 374.16
1912 Act 18 s 37, 38, 39 (Land Bank) – WLC 374.07
1936 Act 24 s 89, 90 (Insolvency) – WLC 374.06, WLC 374.08
1944 Act 13 s 55 (Land Bank) – WLC 374.02, WLC 374.07, WLC 374.08, WLC 374.09, WLC 374.10, WLC 374.11, WLC 374.14, WLC 374.18, WLC 374.22, WLC 374.23, WLC 374.25, WLC 374.30, WLC 374.31, WLC 374.34, WLC 374.39, WLC 374.40, WLC 374.41
1944 Act 13 s 56 (Land Bank) – WLC 374.07, WLC 374.08, WLC 374.11, WLC 374.13, WLC 374.17
1956 Act 54 s 88(1)(b)(ii) – WLC 374.02, WLC 374.05
1956 Act 54 s 90(1) – WLC 374.02, WLC 374.05
1956 Act 54 s 91(1) – WLC 374.02
1956 Act 54 s 92(3) – WLC 374.05, WLC 374.08, WLC 374.09, WLC 374.22, WLC 374.35, WLC 374.40, WLC 374.41, WLC 374.45
1956 Act 54 s 92(4) – WLC 374.05, WLC 374.08, WLC 374.09, WLC 374.13, WLC 374.14, WLC 374.16, WLC 374.18, WLC 374.37
1956 Act 54 s 92(5) – WLC 374.05, WLC 374.08, WLC 374.09
1963 Act 63 s 2 (Water Amendment) – WLC 374.05
1975 Act 42 s 17 (Water Amendment) – WLC 374.05
1980 Act 92 s 13 (Water Amendment) – WLC 374.05
Gentiruco AG v Firestone SA Pty Ltd 1972 1 SA 589 A – WLC 374.15
Seward v The Vera Cruz 1880 10 App Cas 59 – WLC 374.15
Strydom v Land- en Landboubank van SA 1972 1 SA 801 A – WLC 374.17, WLC 374.25
Kruger v Land- en Landboubank van SA 1968 1 SA 67 NC – WLC 374.17
Land and Agricultural Bank of SA v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1979 2 SA 346 N – WLC 374.17
Minister of Justice v McAlpine 1961 4 SA 396 A – WLC 374.17
Osry v Hirsch#Loubser & Co Ltd 1922 C 531 – WLC 374.29
GROENEWEGEN *De Legibus Abrogatis ad C* 8 30 2 – WLC 374.27
MATTHAEUS *De Auctionibus* 1 16 15 – WLC 374.28
STEYN LC *Uitleg van Wette* ed 5 188+ – WLC 374.14
VAN BYNKERSHOEK *Quaestiones Juris Privati* 2 13 – WLC 374.29
VAN DER KESSEL *Praelectiones ad Grotius* 2 48 41 – WLC 374.29
VOET 20 1 13 – WLC 374.27
VOET 20 5 11 – WLC 374.27
VOET 20 5 6 – WLC 374.28
VOET 20 6 6 – WLC 374.27
VOET 42 1 48 – WLC 374.29

***Ixopo Irrigation Board v Land and Agricultural Bank of SA* 1990 Uys WLC 375 N**

[WLC 375 NOTES]

Judgment Date 1990-10-26. **Court** NPD. **Judge(s)** JH HUGO

Also reported as *Ixopo Irrigation Board v Land and Agricultural Bank of SA* 1991 3 SA 233 N

Quick Note

Irrigation board rates – debtor liquidated – Land Bank attaching and selling property – neither Land Bank nor buyer liable for arrear rates

Summary

The facts were similar to those in *Cogmanskloof Irrigation Board v Land and Agricultural Bank of SA* 1989 Uys WLC 374 C (above): A riparian owner, who owed rates to his irrigation board, was sequestrated and the board claimed the rates from the trustee. But the Land Bank then intervened (as it was entitled to do under the Land Bank Act) and attached and sold the debtor's land for the Bank's mortgage loan. The Bank itself bought the property because offers received at the auction did not cover the loan. The board then claimed the arrear rates from the Bank.

The question was whether the Bank was liable for the rates. The case therefore turned on the interpretation of the Land Bank Act.

HELD: The board cannot recover outstanding irrigation rates from the Land Bank: it will have to recover the rates from the former owner, in this case the insolvent estate. In this it therefore dissented from the judgment in the *Cogmanskloof* case.

HELD: On the subsidiary question whether an irrigation board may levy rates against a property which has been attached by the Land Bank, the court agreed with the *Cogmanskloof* judgment that it could not levy rates without the consent of the Land Bank – at least not until the property has been sold.

Sources Noted

1944 Act 13 s 55 (Land Bank) – WLC 375.05, WLC 375.07, WLC 375.10, WLC 375.11, WLC 375.14, WLC 375.15, WLC 375.22, WLC 375.26, WLC 375.31, WLC 375.34, WLC 375.35, WLC 375.36
1944 Act 13 s 56 (Land Bank) – WLC 375.14, WLC 375.16, WLC 375.22, WLC 375.32

1963 GN 1602 r 33(1) (Water Court Rules) – WLC 375.04
 1956 Act 54 s 88(1)(b) – WLC 375.05
 1956 Act 54 s 90(1) – WLC 375.05, WLC 375.06
 1956 Act 54 s 91(1) – WLC 375.05
 1956 Act 54 s 92(3) – WLC 375.06, WLC 375.08, WLC 375.35
 1956 Act 54 s 92(5) – WLC 375.05, WLC 375.06
Cogmanskloof Irrigation Board v Land and Agricultural Bank of SA 1989 Uys WLC 374 C – WLC 375.12, WLC 375.17
Strydom v Land- en Landboubank van Suid-Afrika 1972 1 SA 801 A – WLC 375.17
 KRAUSE LE Notes to Voet 42 1 48: *The History of Parate Executie*, in SALJ 1924 41 20 – WLC 375.20

De Witt v Knierim (1) 1990 Uys WLC 376 C

[WLC 376 NOTES]

Judgment Date 1990-11-27. **Court** CPD. **Judge(s)** S Selikowitz.

Also reported as *De Witt v Knierim* 1991 2 SA 371 C

Quick Note

Underground water – servitude right to water of fountains on neighbour’s farm – proof that digging a hole near to fountains diverted their underground water supply

Summary

W sold a riparian farm to K with the reservation of a right of servitude in favour of W’s lower riparian farm to use the water from two fountains on the upper farm. K then dug a hole near to the fountains with the object of collecting seepage water. W alleged that the dug dam reduced the water available to W from the fountains. The servitude agreement was silent on such a problem.

HELD: The principle is that a grantor may not take back what he had granted. It must therefore be presumed that the parties intended to prohibit the diversion of underground water if it would have the effect of less water being available to W from the fountains.

HELD: That after having heard much technical evidence, the court could not conclude that W had proved that the dug dam diverted underground water from the fountains and that W had now less water available.

Sources Noted

A Becker & Co (Pty) Ltd v Becker 1981 3 SA 406 A – WLC 376.89, WLC 376.90
Chasemore v Richards 1859 7 HL 349, 5 H & N 982, 5 Jur NS 873 – WLC 376.54
Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd 1980 1 SA 796 A – WLC 376.80
Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd 1944 A 106 – WLC 376.80
De Bruijn v Louw 1905 O 11 – WLC 376.27, WLC 376.33, WLC 376.40, WLC 376.51, WLC 376.54, WLC 376.56, WLC 376.58
Du Plessis Estates Ltd v SA Railways and Harbours 1933 Uys WLC 172 E – WLC 376.57, WLC 376.58, WLC 376.59, WLC 376.60, WLC 376.80, WLC 376.86
Grant v Stonestreet 1968 Uys WLC 324 A – WLC 376.82
Ohlsson’s Cape Breweries Ltd v Artesian Well-Boring Co Ltd 1919 Uys WLC 66 C – WLC 376.36, WLC 376.38, WLC 376.39, WLC 376.40, WLC 376.42, WLC 376.43, WLC 376.45, WLC 376.47, WLC 376.48, WLC 376.49, WLC 376.50, WLC 376.51, WLC 376.54, WLC 376.58, WLC 376.60, WLC 376.62, WLC 376.85, WLC 376.96, WLC 376.101
Pieterse v Du Plessis 1971 Uys WLC 338 A – WLC 376.81
Smith v Smith (1) 1913 Uys WLC 17 C – WLC 376.31, WLC 376.32, WLC 376.33, WLC 376.34, WLC 376.41, WLC 376.53, WLC 376.54
Smith v Smith (2) 1914 Uys WLC 22 A – WLC 376.30, WLC 376.35, WLC 376.40, WLC 376.52, WLC 376.54, WLC 376.59, WLC 376.101
Snijman v Boshoff 1905 O 1 – WLC 376.27, WLC 376.28, WLC 376.33, WLC 376.40, WLC 376.51, WLC 376.54, WLC 376.56, WLC 376.58
Struben v Cape Town Districts Waterworks Co 1892 C (9 SC) 68 – WLC 376.32, WLC 376.54, WLC 376.101
Union Government v Marais 1920 Uys WLC 68 A – WLC 376.51, WLC 376.52, WLC 376.53, WLC 376.54, WLC 376.55, WLC 376.58, WLC 376.59, WLC 376.60, WLC 376.81, WLC 376.87
Willoughby’s Consolidated Co Ltd v Copthall Stores Ltd 1918 A 1 – WLC 376.82
 D 39 3 21 – WLC 376.54, WLC 376.55, WLC 376.56, WLC 376.87
 VOET 8 3 6 – WLC 376.27, WLC 376.44

Jansen van Vuuren v Van der Merwe 1991 Uys WLC 377 A

[WLC 377 NOTES]

Judgment Date 1991-09-23. **Court:** AD. **Judge(s)** HJO VAN HEERDEN, EM GROSSKOPF, W VIVIER, JPG EKSTEEN (Judges of Appeal), AP VAN COLLER (Acting Judge of Appeal)

Also reported as *Jansen van Vuuren en Andere v Van der Merwe en Andere* 1992 1 SA 124 A

Quick Note

Water court jurisdiction – permit for building dam in public river – dispute about validity of permit concerns “use, diversion or appropriation” of water – water court has exclusive original jurisdiction

Summary

M got a permit from the Department to build a weir in a river; the lower owners (J) applied to the CPD for a declaration that the permit was invalid; M objected that only a water court could hear a dispute about the “use, diversion or appropriation” of water; that this was such a dispute; and that the supreme court had no jurisdiction to hear the matter. The court upheld the objection and J appealed to the AD.

HELD: The storage of water in a dam involved the “use” thereof and the dispute about the permit was therefore “in connection” with such use. The rights of lower owners would be affected by the dam and from their point of view the dispute was also about the use of water. Therefore the water court has sole jurisdiction. Appeal dismissed

Sources Noted

1912 Act 8 s 34 – WLC 377.13
1956 Act 54 s 9(2) – WLC 377.06, WLC 377.24
1956 Act 54 s 40 – WLC 377.05, WLC 377.09, WLC 377.10
1956 Act 54 s 40(a) – WLC 377.11, WLC 377.18
1956 Act 54 s 40(c) – WLC 377.17
1956 Act 54 s 40(g) – WLC 377.25
1956 Act 54 s 43 – WLC 377.10, WLC 377.18
1956 Act 54 s 62 – WLC 377.27
1956 Act 54 s 62(2) – WLC 377.19, WLC 377.24, WLC 377.27
1956 Act 54 s 62(2H) – WLC 377.02, WLC 377.19
1956 Act 54 s 89 – WLC 377.01
De Wet v Deetlefs (2) 1928 Uys WLC 134 A – WLC 377.12, WLC 377.15
Goosen v Kruger 1955 Uys WLC 271 E – WLC 377.14
Johannesburg Consolidated Investment Co v Town Council of Johannesburg 1903 T 111 – WLC 377.27
Van Rensburg v Taute 1974 Uys WLC 350 A – WLC 377.11
Van Staden v Minister of Water Affairs 1959 Uys WLC 293 – WLC 377.27
Wassung v Simmons 1980 Uys WLC 363 N – WLC 377.14

***Land and Agricultural Bank of SA v Cogmanskloof Irrigation Board* 1991 Uys WLC 378 A**

[WLC 378 NOTES]

Judgment Date 1991-09-27. **Court AD.** **Judge(s)** AS BOTHA, EM GROSSKOPF, W VIVIER, JPG EKSTEEN (Judges of Appeal), AP VAN COLLER (Acting Judge of Appeal)

Also reported as *Land- en Landboubank van Suid-Afrika v Cogmanskloof Besproeiingsraad* 1992 1 SA 217 A

Quick Note

Irrigation board rates – debtor sequestrated – property attached and sold for Land Bank’s mortgage loan – Land bank not liable for arrear rates – but buyer is liable.

Summary

The C irrigation board levied rates and interest on the scheduled hectares of its member H, and when H failed to pay, C had him sequestrated and proved a claim in his insolvent estate.

But the Land Bank, which had a mortgage on the property, attached and sold the farms in terms of the Land Bank Act. The proceeds were insufficient to settle even the Land Bank loan, and C then claimed the arrear rates and interest from the Land Bank (1st defendant) and the trustee of the insolvent estate (2nd defendant). The Land Bank’s defence was that the Land Bank Act exempted it from the payment of such arrear rates. The CPD held (in *Land and Agricultural Bank of SA v Cogmanskloof IB* 1991 Uys WLC 378 A, above) that the Land Bank was not obliged to pay the irrigation board’s claim from the proceeds of the sale, but that the purchaser of the property had to pay it. In this case the Land Bank was the purchaser, and in that capacity it became liable for the rates. A subsidiary point was that, from the date when the Land Bank attaches the property up to the date when it is sold, an irrigation board may not levy rates on the land without the written consent of the Bank. On appeal to the AD by the Bank –

HELD: The irrigation board’s secured claim was not destroyed by the sale and transfer under the Land Bank Act. The court a quo was therefore correct in holding that the Land Bank, as purchaser, was liable for the arrear rates, and its appeal was dismissed with costs.

Sources Noted

1905 CAPE Act 39 s 5 (Deeds Registry) – WLC 378.74
1909 TRANSVAAL Act 25 s 23 (Registration of Deeds and Titles) – WLC 378.74
1912 Act 8 s 70(3) – WLC 378.79
1912 Act 8 s 93 – WLC 378.79
1912 Act 18 s 37(iii) (Land Bank) – WLC 378.72, WLC 378.108
1913 BRITAIN c 34 s 15 (Bankruptcy and Deeds of Arrangement Act) – WLC 378.134
1916 Act 30 s 2 (Land Bank Amendment) – WLC 378.73
1936 Act 24 s 89 (Insolvency) – WLC 378.18
1936 Act 24 s 96 (Insolvency) – WLC 378.120
1936 Act 24 s 99-103 (Insolvency) – WLC 378.120
1937 Act 47 s 56(1) (Deeds Registries) – WLC 378.74
1944 Act 13 s 34(3) (Land Bank) – WLC 378.44, WLC 378.102, WLC 378.104, WLC 378.106
1944 Act 13 s 55 (Land Bank) – WLC 378.19, WLC 378.39, WLC 378.100, WLC 378.106, WLC 378.113, WLC 378.125, WLC 378.139, WLC 378.148, WLC 378.152
1944 Act 13 s 55(1) (Land Bank) – WLC 378.13, WLC 378.126, WLC 378.127
1944 Act 13 s 55(2) (Land Bank) – WLC 378.01, WLC 378.05, WLC 378.08, WLC 378.13. – WLC 378.24, WLC 378.25, WLC 378.33, WLC 378.35, WLC 378.36, WLC 378.37, WLC 378.40, WLC 378.55, WLC 378.56, WLC 378.57, WLC 378.90, WLC 378.104, WLC 378.105, WLC 378.107, WLC 378.108, WLC 378.109, WLC 378.113, WLC 378.127, WLC 378.130, WLC 378.132, WLC 378.135, WLC 378.140, WLC 378.141, WLC 378.145
1944 Act 13 s 55(3) (Land Bank) – WLC 378.13
1944 Act 13 s 55(4) (Land Bank) – WLC 378.08, WLC 378.13

1944 Act 13 s 56 (Land Bank) – WLC 378.18, WLC 378.19, WLC 378.20, WLC 378.90, WLC 378.106, WLC 378.113, WLC 378.142. – WLC 378.145, WLC 378.146, WLC 378.147
 1944 Act 13 s 56(b) (Land Bank) – WLC 378.08, WLC 378.13
 1944 Act 13 s 56(d) (Land Bank) – WLC 378.13, WLC 378.143
 1944 Act 32 rule 43 (Magistrates' Courts) – WLC 378.114, WLC 378.117, WLC 378.118, WLC 378.119, WLC 378.120, WLC 378.121
 1944 Act 32 s 66 (Magistrates' Courts) – WLC 378.114
 1956 Act 54 Chapter 6 – WLC 378.01
 1956 Act 54 s 92(3) – WLC 378.08, WLC 378.14, WLC 378.20, WLC 378.24, WLC 378.25, WLC 378.26, WLC 378.27, WLC 378.33, WLC 378.35, WLC 378.37, WLC 378.79, WLC 378.107, WLC 378.108, WLC 378.109
 1956 Act 54 s 92(4) – WLC 378.08, WLC 378.14, WLC 378.18, WLC 378.19
 1959 Act 59 rule 46 (Supreme Court) – WLC 378.114, WLC 378.130, WLC 378.133, WLC 378.141
 1971 Act 36 s 9 (Water Amendment) – WLC 378.79
Belinco (Pty) Ltd v Bellville Municipality 1970 4 SA 589 A – WLC 378.96, WLC 378.151
Cogmanskloof Irrigation Board v Land and Agricultural Bank of SA 1989 Uys WLC 374 C – WLC 378.15, WLC 378.19, WLC 378.20, WLC 378.34, WLC 378.36, WLC 378.69, WLC 378.99
Curtis v Maloney 1950 2 All ER 982 CA – WLC 378.134
D Glaser & Sons (Pty) Ltd v The Master 1979 4 SA 780 C – WLC 378.145
Ixopo Irrigation Board v Land and Agricultural Bank of South Africa 1990 Uys WLC 375 N – WLC 378.38, WLC 378.43, WLC 378.51, WLC 378.100, WLC 378.110
Johannesburg Municipality v Cohen's Trustees 1909 T 811 – WLC 378.80, WLC 378.84
Khumalo v Director-General of Co-operation & Development 1991 1 SA 158 A – WLC 378.108
Land- en Landboubank van SA v Die Meester 1991 2 SA 761 A – WLC 378.44, WLC 378.46, WLC 378.47, WLC 378.54, WLC 378.97, WLC 378.102, WLC 378.104
Osry v Hirsch, Loubser & Co Ltd 1922 C 531 – WLC 378.123
Rabie v Rand Townships Registrar 1926 T 286 – WLC 378.85
Smuts v Cathcart Divisional Council 1896 C (13 SC) 359 – WLC 378.80, WLC 378.84
Strydom v Land- and Landboubank van SA 1972 1 SA 801 A – WLC 378.39, WLC 378.40, WLC 378.41, WLC 378.42
Union Government (Minister of Lands) v Cape Rural Council 1912 C 857 – WLC 378.85
United Building Society v Smookler's Trustees & Golombick's Trustee 1906 T 623 – WLC 378.76
 BLACK Law Dictionary sv "title" – WLC 378.62
 JONES & BUCKLE *Civil Practice of the Magistrates' Courts* ed 8 p 275 – WLC 378.116
 MATTHAEUS *De Auctionibus* 1 3 11 fin – WLC 378.124
 VAN BYNKERSHOEK *Quaestiones Juris Privati* 2 13 – WLC 378.124
 VAN DER LINDEN *Judiciele Practijc* 3 6 22-42 – WLC 378.114, WLC 378.122
 VOET 20 5 6 – WLC 378.124

De Witt v Knierim (2) 1993 Uys WLC 379 A

[WLC 379 NOTES]

Judgment Date 1993-09-28. **Court:** AD. **Judge(s)** CP JOUBERT, JJF HEFER, JPG EKSTEEN Ms L VAN DEN HEEVER (Judges of Appeal), JC KRIEGLER (Acting Judge of Appeal)

Also reported as *De Witt v Knierim* 1994 1 SA 350 A

Quick Note

Underground water – neighbour has sole right to water from fountains – owner may dig for seepage water nearby – provided that it does not reduce water of fountains

Summary

W's farm had a right of servitude to the water of 2 fountains on K's upper farm. K dug a hole near to the fountains with the object of collecting seepage water. W alleged that the dug dam reduced the water of the fountains, and asked the court for an interdict. The application was refused, and W appealed to the AD.

HELD: From the expert evidence it could be concluded that the dug dam was *not* diverting underground water from the fountains. This finding differed from the finding of the CPD that W had not *proved* such diversion. The result was however the same, namely that W's action for an interdict should be refused. His appeal was therefore dismissed.

Sources Noted

1959 Act 59 s 20(4) (Supreme Court) – WLC 379.01
Boshof, R v 1938 A 464 – WLC 379.15
De Witt v Knierim (1) 1990 Uys WLC 376 C – WLC 379.01
Union Government v Marais 1920 Uys WLC 68 A – WLC 379.14
Van den Berg v Rand Water Board 1945 A 691 – WLC 379.15
 D 39 3 21 – WLC 379.14
 D 39 3 1 12 – WLC 379.14
 JOUBERT CP *Vestiging van servitude op informele wyse*, THRHR 1959 253-61 – WLC 379.16
 VOET 8 3 6 – WLC 379.14

Minister of Water Affairs v Scheerpoort River Riparian Owners 1994 Uys WLC 380 WC

[WLC 380 NOTES]

Judgment Date 1994-03-17. **Court** WC (Pretoria). **Case** 4096/92. **Judge(s)** K VAN DIJKHORST

Quick Note

Apportionment – irrigable area in relation to available water – other agricultural considerations – existing subdivisions to compete equally

Summary

HELD: Public water is apportioned between riparian owners on the basis of the economically irrigable potential of land and not on the basis of existing irrigation. In making the apportionment the following is to be taken account of:

- (a) the “Pietersburg principle”, which determines that the irrigable area which may be brought into consideration may not be larger than that which the total available normal flow can irrigate;
- (b) that riparian land serviced by private water cannot fully compete for public water;
- (c) that the economically irrigable land should be determined by considerations such as distance from and height above the river, the soil type, the availability of water and the cost thereof, existing servitudes, certainty of supply, and typically agricultural considerations; and
- (d) that all subdivisions existing at the time of the apportionment, should be included in an apportionment.

Sources Noted

1894 TRANSVAAL Act 11 s 2 (Public Streams) – WLC 380.78
1899 CAPE Act 40 r 10 (Water) – WLC 380.124
1908 TRANSVAAL Act 27 s 44(1) (Irrigation) – WLC 380.76, WLC 380.78, WLC 380.79
1912 Act 8 s 2 “public water” – WLC 380.82
1912 Act 8 s 2 “riparian owner” – WLC 380.116
1912 Act 8 s 2 “riparian land” – WLC 380.116
1912 Act 8 s 8 – WLC 380.79
1912 Act 8 s 15 – WLC 380.205
1912 Act 8 s 32(b) – WLC 380.90
1912 Act 8 s 45(1) – WLC 380.116
1912 GN 982 r 9 (Principles to Guide Water Courts) – WLC 380.116
1912 GN 982 r 9(i) (Principles to Guide Water Courts) – WLC 380.103
1912 GN 982 r 9(iv) (Principles to Guide Water Courts) – WLC 380.97, WLC 380.103
1912 GN 982 r 9(v) (Principles to Guide Water Courts) – WLC 380.103
1912 GN 982 r 9(vi) (Principles to Guide Water Courts) – WLC 380.103, WLC 380.105
1912 GN 982 r 9(viii) (Principles to Guide Water Courts) – WLC 380.106
1914 Act 32 s 11 (Hartebeestpoort Irrigation Scheme (Crocodile River)) – WLC 380.205
1956 Act 54 s 1 “normal flow” – WLC 380.23
1956 Act 54 s 1 “private water” – WLC 380.51
1956 Act 54 s 1 “public stream” – WLC 380.02, WLC 380.26, WLC 380.60
1956 Act 54 s 1 “riparian land” – WLC 380.27
1956 Act 54 s 5 – WLC 380.79
1956 Act 54 s 5(1) – WLC 380.197
1956 Act 54 s 6(3) – WLC 380.101, WLC 380.208
1956 Act 54 s 8 – WLC 380.138, WLC 380.242
1956 Act 54 s 8(1) – WLC 380.110, WLC 380.114, WLC 380.176
1956 Act 54 s 9 – WLC 380.12
1956 Act 54 s 9(1) – WLC 380.39, WLC 380.92, WLC 380.93, WLC 380.115, WLC 380.216
1956 Act 54 s 9(2) – WLC 380.33
1956 Act 54 s 10 – WLC 380.12
1956 Act 54 s 40(b) – WLC 380.01, WLC 380.86, WLC 380.90, WLC 380.242, WLC 380.247
1956 Act 54 s 41(2) – WLC 380.91
1956 Act 54 s 42(1) – WLC 380.91
1956 Act 54 s 42ter – WLC 380.01, WLC 380.13
1956 Act 54 s 42ter(a) – WLC 380.12
1956 Act 54 s 52 – WLC 380.95
1956 Act 54 s 52(1) – WLC 380.94, WLC 380.96, WLC 380.100, WLC 380.101, WLC 380.102, WLC 380.103, WLC 380.104, WLC 380.105, WLC 380.106, WLC 380.113, WLC 380.115, WLC 380.116, WLC 380.131, WLC 380.134, WLC 380.136, WLC 380.139, WLC 380.167, WLC 380.189, WLC 380.207
1956 Act 54 s 52(2) – WLC 380.137
1956 Act 54 s 52(3) – WLC 380.137
1956 Act 54 s 53 – WLC 380.50
1956 Act 54 s 53(2) – WLC 380.24, WLC 380.50
1956 Act 54 s 59 – WLC 380.08, WLC 380.13
1956 Act 54 s 62 – WLC 380.11
1956 Act 54 s 62(2)bis – WLC 380.09, WLC 380.11
1956 Act 54 s 81 – WLC 380.243
1956 Act 54 s 89(4) – WLC 380.244
1956 Act 54 s 89(5) – WLC 380.244
1956 Act 54 s 89(7) – WLC 380.244
1956 Act 54 s 97 – WLC 380.243
1956 Act 54 s 97(1) – WLC 380.179
1964 Proc 107 (Scheerpoort State Water Control Area constitution) – WLC 380.08
1967 GN 1873 (Scheerpoort State Water Control Area determination repeal) – WLC 380.10
1970 Proc 282 (Scheerpoort State Water Control Area extension) – WLC 380.08
1992 GN 561 (Scheerpoort State Water Control Area deconstitution) – WLC 380.13
1993 GN 1174 (Skeerpoort Irrigation Board constitution) – WLC 380.243
Allen v Tamsen 1932 Uys WLC 167 WC – WLC 380.130
Ball v Erasmus 1927 Uys WLC 130 WC – WLC 380.14, WLC 380.97, WLC 380.99, WLC 380.104, WLC 380.243
Bon Accord Irrigation Board v Pretoria Municipality (2) 1921 Uys WLC 86 WC – WLC 380.67, WLC 380.74

Camphor re Hex River 1921 Uys WLC 73 WC – WLC 380.87
Coxton v Bezuidenhout re Koster River 1916 Uys WLC 44 WC – WLC 380.81
De Wet & Seuns Edms Bpk v Jordaan 1954 Uys WLC 264 WC – WLC 380.87, WLC 380.90, WLC 380.140, WLC 380.243
Du Toit v Krige 1971 Uys WLC 340 WC – WLC 380.59
Eloff re Diversion 1929 Uys WLC 144 WC – WLC 380.87, WLC 380.90, WLC 380.243
Erasmus v De Wet 1874 C (4 Buch) 204 – WLC 380.54, WLC 380.70
Glathaar v Van Rensburg 1925 Uys WLC 112 T – WLC 380.133
Harty v Douglas 1930 Uys WLC 157 WC – WLC 380.121
Jordaan v Winkelman & The Colonial Government 1879 C (9 B) 79 – WLC 380.118
Kirstein re Zendeling Spruit 1917 Uys WLC 53 WC – WLC 380.79
Klein Berg River (2) 1919 Uys WLC 65 WC – WLC 380.14
Kruger re Elandspruit 1934 Uys WLC 177 WC – WLC 380.100, WLC 380.125, WLC 380.130
Le Roux v Kruger 1985 Uys WLC 367 WC – WLC 380.40, WLC 380.53, WLC 380.54, WLC 380.60, WLC 380.62, WLC 380.66
Louw v Dorman 1924 Uys WLC 104 WC – WLC 380.61
Mapochsgronden Streams 1917 Uys WLC 50 WC – WLC 380.45
Meyer v Johannesburg Waterworks Co 1893 T (H) 1 – WLC 380.73
Ohlsson's Cape Breweries Ltd v Artesian Well-Boring Co Ltd 1919 Uys WLC 66 C – WLC 380.61
Ohrigstad Besproeiingsraad v Slabbert 1965 Uys WLC 318 WC – WLC 380.244
Pretoria Municipality v Bon Accord Irrigation Board 1923 Uys WLC 94 T – WLC 380.222
Rabie v De Wet (3) 1952 Uys WLC 254 WC – WLC 380.97, WLC 380.120
Rand Water Board re Vaal River 1916 Uys WLC 40 WC – WLC 380.45, WLC 380.97
Reid v Van der Merwe 1926 Uys WLC 123 T – WLC 380.243
Retief v Louw 1874 C (4 Buch) 165 – WLC 380.54, WLC 380.70
Silberbauer v Van Breda and Cape Town Municipality 1864-7 C (5 Searle) 231 – WLC 380.71
Smartt Syndicate v Certain Riparian Owners 1921 Uys WLC 77 C – WLC 380.37, WLC 380.119
Somerset West Municipality and Cape Explosives Works 1936 Uys WLC 186 WC – WLC 380.52, WLC 380.59, WLC 380.76 – WLC 380.77, WLC 380.90, WLC 380.104, WLC 380.125, WLC 380.175
Stevenson re Visch Spruit 1934 Uys WLC 180 WC – WLC 380.131
Struben v Cape Town Waterworks 1891-2 C (9 SC) 68 – WLC 380.75, WLC 380.81
Struben v Certain Riparian Owners (1) 1948 Uys WLC 231 WC – WLC 380.81
Struben v Certain Riparian Owners (2) 1949 Uys WLC 235 WC – WLC 380.97, WLC 380.120, WLC 380.140
Struben v Collett 1899 C (16 SC) 550 – WLC 380.105
Taute v Janse van Rensburg 1973 Uys WLC 346 WC – WLC 380.59
Taylor re Sabalele Stream 1932 Uys WLC 170 WC – WLC 380.125, WLC 380.130
Transvaal United Trust and Finance Co Ltd v Pietersburg Municipality 1931 Uys WLC 158 WC – WLC 380.82, WLC 380.97, WLC 380.99, WLC 380.122, WLC 380.123, WLC 380.124, WLC 380.125, WLC 380.126, WLC 380.130, WLC 380.132
Union Government re Modini Spruit 1938 Uys WLC 199 WC – WLC 380.125, WLC 380.131
Union Government re Mooi River (2) 1915 Uys WLC 32 WC – WLC 380.97, WLC 380.106
Union Government v Marais 1920 Uys WLC 68 A – WLC 380.75
Van Breda v Silberbauer 1869 3 LR PC 84, 6 Moo NS 319, 16 ER 746, 1870 39 LJ PC 8 – WLC 380.71
Van der Vyver v Conradie 1914 Uys WLC 28 C – WLC 380.244
Van Heerden re Liefde-en-Vrede Spruit 1935 Uys WLC 182 WC – WLC 380.97, WLC 380.100, WLC 380.125, WLC 380.130
Van Heerden v Weise 1880 A (1 BAC) 5 – WLC 380.52, WLC 380.54, WLC 380.55, WLC 380.66, WLC 380.72, WLC 380.119
Venter v De Villiers 1916 Uys WLC 42 WC – WLC 380.106, WLC 380.191
Vermaak v Palmer 1876 C (6 Buch) 32 – WLC 380.54, WLC 380.71
Wassung v Simmons 1980 Uys WLC 363 N – WLC 380.241
D 8 3 17 – WLC 380.118
DE VILLIERS JER *Water Law 1: The 8th section [of Act 8 of 1912]*, SALJ 1920 37 247 – WLC 380.52
DE VILLIERS JER *Water Law 2: Existing rights*, SALJ 1921 38 3 – WLC 380.39
DE VILLIERS JER *Water Law 3: The 8th section [of Act 8 of 1912] again: Public streams*, in SALJ 1921 38 13 – WLC 380.55, WLC 380.56, WLC 380.67
DE VILLIERS JER *Water Law 4: Sections 8-10 [of Act 8 of 1912]: The normal flow*, SALJ 1921 38 121 – WLC 380.37
DE VILLIERS JER *Water Law 5: The normal flow*, SALJ 1921 38 254 – WLC 380.37, WLC 380.39, WLC 380.42
DE VILLIERS JER *Water Law 6: The normal flow*, SALJ 1921 38 261 – WLC 380.32, WLC 380.37
DE WET JC *Opuscula Miscellanea* 1979 1, 29, 32 – WLC 380.83, WLC 380.105
HALL CG *Water Rights in SA* ed 4 122-3 – WLC 380.14
HALL CG *Water Rights in SA* ed 4 15 – WLC 380.39
HALL CG *Water Rights in SA* ed 4 21 – WLC 380.52, WLC 380.59, WLC 380.66

***AW Burman Holdings Pty Ltd v Great Letaba Irrigation Board* 1994 Uys WLC 381 T**

[WLC 381 NOTES]

Judgment Date 1994-12-07. **Court:** TPD. **Judge(s)** CF ELOFF (Judge President), AJ HEYNS

Also reported as *AW Burman Holdings (Pty) Ltd v Great Letaba Irrigation Board* 1995 3 SA 158 T

Quick Note

Unlawful abstraction of public water – powers of irrigation board to prevent it – may institute criminal prosecution or use self-help by locking pumps of transgressor

Summary

An irrigation board (G) alleged that A was unlawfully abstracting too much water from the river. When A denied it, G chained and locked A's water pumps. A applied to the magistrate's court for a *mandament van spolie* but the magistrate dismissed the application. In A's appeal to the TPD –

HELD: The power of an irrigation board to prevent any unlawful abstraction or storage of public water does not limit it to the institution of a criminal procedure. It may take direct and effective action by the use of self-help.

HELD: A failed to prove that G's action of locking the pumps was unlawful. A's appeal was therefore dismissed.

Sources Noted

1956 Act 54 s 9A(4) – WLC 381.09, WLC 381.11

1956 Act 54 s 62 – WLC 381.02

1956 Act 54 s 89(1) – WLC 381.06, WLC 381.11

Chotabhai v Union Government 1911 A 13 – WLC 381.10

***Harris v Williams* 1995 Uys WLC 382 W**

[WLC 382 NOTES]

Judgment Date 1995-12-15. **Court:** WLD. **Judge(s)** JH COETZEE

Also reported as *Harris v Williams* 1998 2 SA 263 W

Quick Note

Stormwater on urban property – may not discharge onto lower property – must lead water to street – if necessary by a servitude drain over other property.

Summary

The adjoining stands of H and W were on the same street, H's stand being below W's, and apparently also below the street level. There was a 2-foot wide servitude of drainage over H's stand in favour of W but the stormwater from W was not channelled within the servitude area and flowed freely over stand H.

H applied to court to order W to channel his stormwater to the street down the servitude area.

HELD: The common law rule that a lower owner was obliged to accept a higher owner's stormwater, did not apply to urban areas.

HELD: A higher owner had to channel his stormwater directly to the street. If it was not possible due to the lay of the land, he had to channel it via a drainage servitude over other properties.

HELD: Whereas a drainage servitude was registered in this case, W had to channel his water via the the servitude area only.

[The judgment was reversed on appeal: *Williams v Harris* 1998 Uys WLC 385 A, below]

Sources Noted

Barklie v Bridle 1955 Uys WLC 272 Z – WLC 382.26

Bishop v Humphries 1919 WLD 13 1919 Uys WLC 63 W – WLC 382.20, WLC 382.21, WLC 382.22, WLC 382.23, WLC 382.27

De Villiers v Galloway 1943 Uys WLC 207 A – WLC 382.19

Green v Borstel 1940 2 PH M89 W – WLC 382.24

Johannesburg Municipal Council v Rand Townships Registrar 1910 T 1314 – WLC 382.47

Ludolph v Wegner 1888-9 C (6 SC) 193 – WLC 382.19

Redelinghuis v Bazzoni 1975 Uys WLC 354 T – WLC 382.28

Retief v Louw 1874 C (4 B) 165 – WLC 382.19

Smith v Farrelly's Trustee 1904 T 949 – WLC 382.47

Wassung v Simmons 1980 Uys WLC 363 N – WLC 382.43

GROTIUS *Inleidinge* 2 34 10 – WLC 382.18

GROTIUS *Inleidinge* 2 34 11 – WLC 382.18

GROTIUS *Inleidinge* 2 34 16 – WLC 382.17, WLC 382.23, WLC 382.30

HALL CG *Servitudes* ed 3 1973 p 98 – WLC 382.19

SCHOLTENS JE *Note on Bishop v Humphries*, in ANNUAL SURVEY OF SA LAW 1956 p 136 – WLC 382.27

***Smuts v Minister of Water Affairs and Forestry* 1996 Uys WLC 383 O**

[WLC 383 NOTES]

Judgment Date 1996-11-29. **Court** OPD. **Judge(s)** DA KOTZÉ.

Quick Note

Tributaries of a specific river – does not include tributaries of tributaries.

Summary

A proclamation constituting a government water control area provided that all tributaries of the W river are to be included in the control area.

The farm of S was on a tributary of a tributary of the W river, and S claimed that his farm was no included in the control area.

HELD: There is no statutory definition of the word "tributary". Therefore when the proclamation speaks of "tributaries" of a public stream it must be given its ordinary meaning, and cannot be extended to tributaries of tributaries.

Sources Noted

1956 Act 54 s 59(1) – WLC 383.02

1970 Proc 181 (Vaal Dam Catchment Government Water Control Area) – WLC 383.02, WLC 383.03

1956 Proc 32 (Vaalwater Government Irrigation Area) – WLC 383.02

1965 Proc 116 (Vaalwater government water control area) – WLC 383.02

1969 Proc 270 (Wilge River State Water Control Area) – WLC 383.02

Union Government v Matt 1917 A 731 – WLC 383.07

STEYN LC *Uitleg van Wette* 4 – WLC 383.07

Low Water Properties Pty Ltd v Wahloo Sand CC 1998 Uys WLC 384 SEC

[WLC 384 NOTES]

Judgment Date 1998-01-07. **Court:** SEC (South-Eastern Cape Provincial Division). **Judge(s)** HJ LIEBENBERG.

Also reported as *Low Water Properties (Pty) Ltd and Another v Wahloo Sand CC 1999 1 SA 655 SEC*

Quick Note

Personal servitude – obligation to maintain borehole equipment for flow of water to neighbour – not automatically transferred to owner's successor

Summary

A farmer (P) granted to his 2 neighbours (L) the right to receive water from a borehole on his farm, to store it in a demarcated area (the dam), and to lead it from there by way of a pipeline to their farms. The agreement was embodied in a notarial deed of servitude which was registered in the deeds office. L had to supply the equipment, machinery and pipes and P had to maintain it so that sufficient water was delivered to L for domestic use.

P sold his farm to W, who subdivided it into many portions, all subject to the servitude. W sold some portions but retained those portions with the borehole, dam and pipeline. W refused to comply with the parts of the servitude which obliged him to maintain the system, on the ground that it was a personal obligation of the former owner (P) and not a real obligation which was transferred to P's successors. L then applied to court.

HELD: A successor in title is not bound to any personal servitude which was binding on his predecessor, even if registered in a deeds office, except if his deed of sale obliged him to. The deed of sale in this case did not expressly transfer the personal servitude obligations of P to W. Ls' application was therefore dismissed.

Sources Noted

1937 Act 47 s 63(1) (Deeds Registries) – WLC 384.14, WLC 384.16, WLC 384.17, WLC 384.20, WLC 384.20, WLC 384.22, WLC 384.23

1973 Act 62 s 10 (General Law Amendment) – WLC 384.14, WLC 384.16

Geldenhuis 1926 O 155 – WLC 384.18, WLC 384.21, WLC 384.24

Lorentz v Melle 1978 3 SA 1044 T – WLC 384.20, WLC 384.27, WLC 384.28

Nel v CIR 1960 1 SA 227 A WLC 384.18

Schwedhelm v Hauman 1947 1 SA 127 E – WLC 384.10, WLC 384.13, WLC 384.14, WLC 384.18, WLC 384.22, WLC 384.27, WLC 384.28

Van der Merwe v Wiese 1948 4 SA 8 C – WLC 384.12, WLC 384.13, WLC 384.14, WLC 384.22

Vansa Vanadium SA Ltd v Registrar of Deeds 1997 2 SA 784 T – WLC 384.27, WLC 384.28

Williams v Harris 1998 Uys WLC 385 A

[WLC 385 NOTES]

Judgment Date 1998-05-29. **Court:** AD. **Judge(s)** JW SMALBERGER, PM NIENABER, RM MARAIS, DG SCOTT and CA PLEWMAN (Judges of Appeal)

Also reported as *Williams v Harris 1998 3 SA 970 A*

Quick Note

Stormwater on urban property – may discharge onto lower property at the place where it flowed naturally – need not lead water directly to street – need not channel water via a specific drain – evidence needed of human intervention of natural flow and of other facts in dispute – case referred back to court a quo

Summary

This was an appeal from the WLD decision in *Harris v Williams* 1995 Uys WLC 382 W. For the facts, see the Summary in WLC 382 NOTES (above). They were, shortly, that H complained that W was causing damage to H's outbuildings by unlawfully allowing rain water from his higher erf to enter H's lower erf at any place over their common boundary, other than directly to the street via a 2-foot wide servitude strip which was registered for that purpose over H's erf. The WLD HELD that the common law rule that a lower owner was obliged to accept a higher owner's stormwater, did not apply to urban areas, and that W had to channel his water directly to the street, in this case via the servitude area. On appeal by W to the AD –

HELD: The lower court erred in its view of the common-law which allows the discharge of stormwater from a higher-lying property to a lower-lying property where the water flowed naturally from one property to the other by reason of their respective situations. The rule applied to rural as well as urban properties. But the rule could be influenced if there was human intervention in the natural flow of the water.

HELD: The appeal therefore succeeded in that respect, but the matter was referred back to the court a quo to hear oral evidence on the facts in dispute, including whether there was any intervention by W of the natural flow of rain water.

Sources Noted

Austen Bros v Standard Diamond Mining Co Ltd (1882) 1 HCG 363 – WLC 385.24, WLC 385.27

Barklie v Bridle 1955 Uys WLC 272 Z – WLC 385.26, WLC 385.27, WLC 385.30, WLC 385.35, WLC 385.37

Benoni Town Council v Meyer (I) 1959 Uys WLC 291 W – WLC 385.40

Bhayroo v Van Aswegen 1915 TPD 195 – WLC 385.26

Bishop v Humphries 1919 Uys WLC 63 W – WLC 385.26, WLC 385.27, WLC 385.30, WLC 385.31, WLC 385.37, WLC 385.38

Cape Town Council v Benning 1917 Uys WLC 48 A – WLC 385.24, WLC 385.26, WLC 385.27

De Villiers v Galloway 1943 Uys WLC 207 A – WLC 385.26, WLC 385.27, WLC 385.29

Dickens v Lake 1906 C (23 SC) 201 – WLC 385.26

Gorgens v Williams 1945 Uys WLC 216 C – WLC 385.26, WLC 385.28

Green v Borstel 1940 2 PH M89 W – WLC 385.30, WLC 385.33

Johannesburg Municipality v African Realty Trust Ltd 1927 A 163 – WLC 385.28
Kohne v Harris 1899 C (16 SC) 144 – WLC 385.28
Labuschagne v Steyn 1928 Uys WLC 140 O – WLC 385.28
Ludolph v Wegner 1888-9 C (6SC) 193 – WLC 385.24, WLC 385.26
New Heriot Gold Mining Co Ltd v Union Government 1916 Uys WLC 43 A – WLC 385.26, WLC 385.27
Redelinghuis v Bazzoni 1975 Uys WLC 354 T – WLC 385.30, WLC 385.36
Retief v Louw 1874 C (4B) 165 – WLC 385.24, WLC 385.26, WLC 385.27, WLC 385.29
Van der Merwe v Van Dyk 1900 C (17 SC) 538 – WLC 385.26
 DIGEST 39 3 1 17 – WLC 385.46
DERHAM Interference with Surface Waters by Lower Landholders LQR 1958 74 361-80 – WLC 385.24, WLC 385.29
GROTIUS 2 34 16 – WLC 385.30, WLC 385.37, WLC 385.38, WLC 385.40, WLC 385.46
GROTIUS 2 35 17 – WLC 385.39, WLC 385.40
MILTON JRL Law of Neighbours in SA, in ACTA JURIDICA 1969 1 p 215-33 – WLC 385.24
RODGER Owners and Neighbours in Roman Law 141-66 – WLC 385.24
SCHOLTENS JE Property law [Note on Bishop v Humphries], ASSAL 1956 130-6 – WLC 385.37
VAN DER MERWE CG Neighbour Law, in ZIMMERMAN AND VISSER *Southern Cross* 759-84 – WLC 385.24

Feedmill Development Pty Ltd v Attorney-General of KwaZulu-Natal 1998 Uys WLC 386 N

[WLC 386 NOTES]

Judgment Date 1998-07-08. **Court** NPD. **Judge(s)** KK MTHIYANE

Also reported as *Feedmill Development (Pty) Ltd and Another v Attorney-General of KwaZulu-Natal* 1998 2 SACR 539 N, 1998 4 All SA 34, and 1998 BCLR 1072.

Quick Note

Pollution of river – Discharging industrial effluent into storm water drain – long procedure for taking samples and bringing accused to trial – whether unreasonable delay

Summary

A company and one of its directors were charged in the magistrates' court with contravening the Water Act by allowing noxious effluents from their factory to be discharged into a public stream. When the matter went to trial 3 years later, the accused applied that the charges be quashed on the ground that there was an unreasonable delay in bringing them to court. The accused were allowed to make an application to the High court for an order setting aside the charges against them and for an interdict to forbid their further prosecution. The basis of their defence was their constitutional right "to have their trial begin and conclude without unreasonable delay".

HELD: (1) The accused did not suffer serious prejudice by the delay; (2) The investigation of the case was complex and various procedures had to be followed in taking and analysing samples and obtaining technical verification and opinions; (3) The delay was caused partly by the accused director who was overseas on many occasions.

HELD: The defence that the accused were no longer able to take their own samples and to locate witnesses for the defence, was dismissed because it was the statutory duty of the accused to take their own samples when the pollution was first pointed out to them by the inspector.

Sources Noted

Canadian Charter of Rights and Freedoms s 11(b) – WLC 386.22
 USA Constitution 6th Amendment – WLC 386.22
 1956 Act 54 s 21(1) – WLC 386.02, WLC 386.07
 1956 Act 54 s 23(1) – WLC 386.02, WLC 386.06, WLC 386.30, WLC 386.42
 1993 Act 200 s 25(3) ([Interim] Constitution of the RSA) – WLC 386.24
 1996 Act 108 s 35(3) (Constitution of the RSA) – WLC 386.23
Attorney-General's reference 1 of 1990 1992 3 All ER 169 CA – WLC 386.22
Berg v Prokureur-Generaal van Gauteng 1995 BCLR 1441 T – WLC 386.25
Coetzee v Attorney-General KwaZulu-Natal 1997 1 SACR 546 O; 1997 BCLR 989 – WLC 386.35
Connelly v Director of Public Prosecutions 1964 AC 1254 HL – WLC 386.22
Klein v Attorney-General, Witwatersrand Local 1995 3 SA 848 W – WLC 386.25
R v Askow 1990 59 CCC 3d 449 – WLC 386.22
R v Horseferry Road Magistrate's Court; Ex parte Bennett 1993 3 WLR 19 HL – WLC 386.22
R v Telford Justices, Ex parte Badhan 1991 2 WLR 866 QB – WLC 386.22
Tan v Cameron 1993 2 All ER 493 PC – WLC 386.22
Wild v Hoffert 1997 2 SACR 233 N; 1997 BCLR 974 – WLC 386.21
Wild v Hoffert 1998 3 SA 695 CC; 1998 2 SACR 1; 1998 BCLR 656 – WLC 386.21