THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 087/2003

In the matter between:

IMPALA WATER USERS ASSOCIATION **APPELLANT**

and

PIET ERASMUS LOURENS N.O
AND 20 OTHER APPPLICANTS **RESPONDENT**

CORAM: HOWIE P, FARLAM, BRAND JJA, JONES et VAN HEERDEN AJJA

HEARD: 24 FEBRUARY 2004

DELIVERED: 26 MARCH 2004

SUMMARY: Water – National Water Act 36 of 1998 - Mandament van Spolie – whether rights of water users who were entitled to rights under previous Water Act 54 of 1956 capable of protection by mandament of spolie when restricted by water supplier purportedly in terms of s 59(3) of Act 36 of 1998 – incidence of onus to prove outstanding water use charges were legally payable.

JUDGMENT

FARLAM JA

[1] This is an appeal from a spoliation order granted by Van der Reyden J, sitting in the Natal Provincial Division of the High Court, in which the appellant

was ordered to remove locks, chains and welding works from identified sluices (which allowed the flow of water to farms owned by the respondents) and to restore, *ante omnia,* the flow of water from the water canals of the Bivane-Paris dam, through the said sluices, to reservoirs on the respondents' farms.

[2] Prior to its declaration on 12 January 2001 as a water user association in terms of s 98(6)(*a*) of the National Water Act 36 of 1998 (to which I shall refer in what follows as 'the Act'), the appellant was known as the Impala Water Irrigation Board.

[3] The respondents are all farmers and water users within the area of operation of the appellant. They cultivate sugar cane on their farms. They were all formerly members and water users of the appellant when it was an irrigation board and had applied for and obtained registration of a certain number of hectares for irrigation in terms of a schedule of rateable areas prepared in terms of s 88 of the Water Act 54 of 1956, which was repealed by the Act. When the appellant became a water user association, all the respondents automatically, in terms of paragraph 7.2 a of its constitution, became members.

[4] A dispute has arisen between the respondents and the appellant as to the legality of a portion of the water charge raised and assessed by the appellant on its members. The portion in question related to the costs of financing the construction of the Paris-Bivane dam. The appellant has sought to recover from its members an amount of R800-00 per hectare per annum as a dam financing component of the water charge. The respondents contend that they are obliged

to pay only R240-00 per hectare per annum and that the appellant cannot legally seek to recover the balance, ie, R560-00 per hectare per annum, from them.

[5] The appellant sought to recover the portion of the water charge from some of the respondents by suing them in the Pongola magistrate's court for the amounts allegedly due. These actions were subsequently withdrawn, whereupon the appellant issued summons against certain of the respondents in the Natal Provincial Division of the High Court for the same amounts. After appearance to defend had been entered, the appellant sought summary judgment on its claims. Summary judgment was, however, refused with the consent of the appellant and the respondent defendants were given leave to defend.

[6] Before the actions were heard the appellant decided to exercise its powers under s 59(3)(*b*) of the Act and to restrict the flow of water to the respondents by locking the sluices, which it did on 1 February 2003. On the following day the respondents brought a spoliation application against the appellant, which was granted on 14 February 2003.

[7] Section 59 (3) and (4) of the Act provides as follows:

'(3) If a water use charge is not paid-

(*a*) interest is payable during the period of default at a rate determined from time to time by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette;* and

(*b*) the supply of water to the water user from a waterwork or the authorization to use water may be restricted or suspended until the charges, together with interest, have been paid.

> (4) A person must be given an opportunity to make representations within a reasonable period on any proposed restriction or suspension before the restriction or suspension is imposed.'

[8] Before purporting to act in terms of s 59(3) the appellant afforded the respondents the opportunity in terms of s 59(4) of making representations to it as to why the supply of water to their properties should not be restricted. It is of course clear that the procedure set forth in ss (4) is not intended as a hearing on liability at which the water user is required to satisfy the water supplier that nothing is owed. Such liability must be either admitted or judicially established. *This* hearing is intended to be premised on the water charge being unquestionably due, and to elicit explanation why the restriction should not be imposed.

[9] In his judgment the learned judge held, following the judgment of this Court in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A), that the respondents had been exercising rights to water without disturbance and that the exercise of those rights fell within the concept of *quasi-possessio.* He then proceeded to consider whether the deprivation by the appellant of the respondents' 'possession' had taken place illegally. He accepted the argument advanced before him by counsel for the respondents that it was for the appellant to show that its actions in interfering with the flow of water to the respondents' properties fell strictly within the four corners of the authorising statute and that, in order to be able to invoke its powers under section 59(3) of the Act, the appellant had to show that the portion of the water charge withheld

by the respondents was lawfully owing and payable. In this regard he followed the decision of this Court in *George Municipality v Vena and Another* 1989 (2) SA 263 (A), in which it was held that a person who has disturbed another in his possession of property without recourse to law in purported exercise of a statutory power to do so bears the onus of showing that his actions were covered by the statute relied on. Pointing out that it was common cause that there was a dispute between the parties as to whether the appellant could legally seek to recover the balance of the dam financing component from them, he held that the appellant had failed to discharge the onus of showing that it could rely on the provisions of section 59(3).

[10] Counsel for the appellant contended that the judgment of the court *a quo* was incorrect in several respects: viz

(1) because the respondents were never in possession of a right to use the water in the sense required for the *mandament van spolie;*

(2) because the appellant was covered by the powers conferred upon it by section 59(3) of the Act, either because the *onus* rested upon the respondents to prove that the appellant's actions were not covered by section 59(3) and were accordingly unlawful and they had failed to discharge that onus or because the appellant, if it bore the onus, had discharged it.

[11] In support of the first contention counsel for the appellant submitted that

the court *a quo* erred in holding that the decision of this Court in *Bon Quelle, supra,* applied to the facts of this case. This was because, so it was argued, the rights to receive water on which the respondents relied were mere personal rights resulting from the contract between the appellant and each of the members concerned. In terms of this contract, each member became a member of the appellant and acquired the privileges of membership, especially the privilege of receiving the water in exchange for the performance of membership obligations which include payment of the charges raised by the appellant. Relying on the recent decision of this Court in *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA), counsel submitted that in this case spoliation proceedings had been misused in order to enforce a contractual right and not, as was the case in *Bon Quelle, supra,* a servitutal right.

[12] Counsel contended further that the contract between the appellant and each member in terms of which the appellant undertook to supply water was similar in all material respects to common contracts for the supply of water, electricity and telephone services to ordinary domestic users throughout the country. Counsel also argued, again relying on the *Xsinet* decision, that, as the appellant's servants did not enter on the respondents' premises to restrict the water supply, no spoliation had occurred.

[13] Counsel for the appellant submitted further that if the *Bon Quelle* decision was not distinguishable, then the finding that an applicant for an order for the restoration of *quasi-possessio* of a right need not prove the objective

existence of the right in question was incorrect.

[14] In regard to the incidence of the *onus* to prove whether the action complained was covered by the terms of section 59(3)(*b*), counsel for the appellant contended that the decision of this Court in *George Municipality v Vena and Another, supra,* was incorrect and was in conflict with an earlier decision of this Court, *Sillo v Naude* 1929 AD 21, in which it was held, so counsel submitted, that it was for an applicant for a spoliation order to prove that the acts by which he was deprived of possession were unlawful. According to counsel, the *Sillo* decision, which was not mentioned in the later *George Municipality* case, was to be preferred.

[15] Finally, as indicated, counsel contended that, if the onus to prove that the action taken by the appellant was covered by the Act rested on the appellant, it had in any event succeeded in discharging that onus.

[16] Counsel for the respondents argued, on the other hand, that the respondents had shown that they or the entities they represented had been deprived of rights capable of protection by spoliation proceedings and that it was incorrect to describe such rights merely as contractual rights. It was also contended that, even though the appellant's servants had not entered upon the respondents' premises, they had, by locking the sluices and preventing water from flowing on to the properties concerned, interfered with the rights of quasi-possession on which the respondents relied. It was submitted further that no basis had been established for overruling this Court's decision in *Bon Quelle.*

[17] In regard to the onus, counsel for the respondents submitted that the *George Municipality* decision was correct and should be followed and that the appellant had not succeeded in discharging the *onus* of showing that its actions were lawful. In this regard strong reliance was placed on the fact that the enforceability of the balance of the dam financing component of the water charge is currently the subject of defended actions between the appellant and some of the respondents in the court *a quo* and that the appellant had agreed in each of those actions to the grant of an order giving the respondents concerned leave to defend.

[18] The first question to be considered, in my view, is whether the rights on which the respondents relied were merely contractual and whether the *Xsinet* decision can be applied. In my opinion, it is not correct to say that the rights in question were merely contractual. It will be recalled that the respondents or the entities they represent were all entitled to rights under the previous Water Act 54 of 1956, which rights were registered in terms of the schedule prepared under section 88 of that Act. These rights were clearly not merely personal rights arising from a contract. The individual respondents and the entities represented by the other respondents all automatically, in terms of paragraph 7.2 a of the appellant's constitution, became founding members of the appellant. It is clear therefore that the rights to water which belonged to the individual respondents and the entities represented by the other respondents, in so far as they were replaced by or, perhaps more accurately put, subsumed into rights under the Act,

cannot be described as mere personal rights resulting from contracts with the appellant. It follows that, on that ground alone, the *Xsinet* decision, on which the appellant's counsel relied, is not applicable.

[19] The facts of this case also differ in another material respect from those in the *Xsinet* case. There it was held (at paragraphs [12] and [13]) that the respondents' use of the bandwidth and telephone services in question did not constitute an incident of its use of the premises which it occupied, with the result that the disconnection by Telkom of the telephone lines to Xsinet's telephone and bandwidth systems did not constitute interference with Xsinet's possession of its equipment. In the present case, however, the water rights interfered with were linked to and registered in respect of a certain portion of each farm used for the cultivation of sugar cane, which was dependent on the supply of the water forming the subject matter of the right. The use of the water was accordingly an incident of possession of each farm which was, in my view, interfered with by the actions of the appellant's servants. Indeed in the *Xsinet* decision itself it was said at the end of paragraph [12] (at 314 C-D):

'Xsinet happened to use the services at its premises, but this cannot be described as an incident of possession in the same way as the use of water or electricity installations may in certain circumstances be an incident of occupation of residential premises.'

In my view, unless the *Bon Quelle* decision is to be overturned, the respondents have clearly established that the rights to water enjoyed by the individual respondents and the entities represented by the other respondents were capable of protection by the *mandament van spolie*.

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

[21] I am accordingly of the view that the court *a quo* correctly held that rights capable of protection by spoliation proceedings had been interfered with in the present case.

[22] It is accordingly necessary to consider whether such interference is to be regarded as lawful so that no spoliation can be held to have taken place. In this regard the first question to be discussed is whether, as the court *a quo* found, the onus rested on the appellant to show that its actions were covered by the provisions of section 59(3). In the *George Municipality* case, *supra* (at 271E), Milne JA expressly approved a statement by Friedman J in the court of first instance in that case, which read as follows:

‘It is a fundamental principle of our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle.’

Applying this principle, I agree with the judge *a quo* that section 59(3) can only be invoked when the water use charge the non-payment of which triggers the power to restrict the supply of water to a user is legally payable. Indeed, I did not understand counsel for the appellant to dispute this proposition.

[23] It is clear in my view that, unless it is open to us to depart from the *ratio*

in the *George Municipality* case (either because it is in conflict with the decision of this Court in *Sillo v Naude* and we consider the contrary view to be the better view in the circumstances or because, if there is no such conflict we think it clearly wrong), we must hold that the onus rested on the appellant.

[24] I cannot agree that the *George Municipality* decision is in conflict with the *ratio* in the *Sillo* case. It is true that De Villiers ACJ said in the latter case (at 26) that an applicant for a spoliation order has to show

'not only that he was in possession at the time of ejection (which has not been denied), but also that instead of invoking the proper machinery of the Court, the respondent took the law into his own hands and by force, or by other unlawful means, wrongfully and unlawfully deprived him . . . of possession by sending the cattle to the pound.'

As the last portion of the passage I have quoted indicates, the alleged act of spoliation was the sending of the aggrieved party's cattle to the pound. **[25]**

The facts in *Sillo's* case were that the respondent, who was a farmer, summarily dismissed the appellant, a farm labourer who had the right under his contract of service to graze his stock upon the respondent's farm. The appellant refused to leave, whereupon the respondent impounded his stock which, as it was put in the judgment, were 'running in their accustomed place' on the farm. The appellant then brought a spoliation application against the respondent. He failed in the provincial division and his appeal to this Court was dismissed. The basis for the decision appears in the following passage (at 26-7) in the judgment:

'. . . by setting the machinery of the Pound Ordinance into motion the respondent cannot, in

any aspect of the matter, be said to have taken the law into his own hands. In sending the cattle to the pound he merely invoked the aid of the law of the land in his dispute with the appellant. If he has unlawfully impounded the cattle, he is liable in damages to the owner (sec. 49 of Ordinance 3 of 1912, O.F.S), and he would be so liable if, when the issues in dispute between the parties come to be tried, it is found that the cattle were not trespassing, for according to sec. 18(1) of the Ordinance only cattle found trespassing may be sent to the pound. The decision made by himself that the cattle were trespassing, and the fact of acting upon that decision by sending the cattle to the pound, does not constitute taking the law into his own hands. The Pound Ordinance does not provide any machinery to determine there and then whether or not cattle are trespassing, and the owner of the land must of necessity, therefore, make up his mind whether they are or not, taking the risk of being mulcted in damages if he comes to a wrong conclusion. But to hold that under such circumstances he is taking the law into his own hands would be to lay down the absurd proposition that in every case where the owner of cattle, at the time of trespass, chooses to deny that the cattle are trespassing he would be entitled to a *mandament van spolie* if his cattle are then impounded.'

As he had not taken the law into his own hands he was held not to be guilty of spoliation. No such considerations apply here. It cannot be said that, by locking the sluices, the appellant merely 'invoked the aid of the law of the land in [its] dispute' with the respondents. No necessity, such as was found to be present in a situation where a land owner finds cattle on his farm which he thinks are trespassing, existed in this case.

[26] It follows that the statement by De Villiers ACJ earlier in his judgment that an applicant for a spoliation order has to show that the deprivation of which he complains was wrongful and unlawful was *obiter* and affords no basis for

this Court to depart from what was held in the *George Municipality* case, unless we are satisfied that it was clearly wrong. Counsel for the appellant did not seek to persuade us that the *George Municipality* decision was clearly wrong on this point and I am, on the contrary, satisfied that it is correct. The considerations set out in the judgment as to self-help are in any event buttressed by the provisions of section 34 of the Constitution, which reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum.'

[27] In the circumstances it is clear that the onus to show that the portion of the water use charges not paid was legally due rested on the appellant. I cannot hold that it was discharged. As counsel for the respondents (correctly in my view) submitted, in view of the fact that the question as to whether the unpaid portion of water use charge is legally due by the respondents is the subject of other proceedings in the court *a quo* and the appellant consented in its summary judgment application to an order giving the respondents concerned leave to defend, that question must be regarded for present purposes as an open one.

[28] It follows from what I have said that the appeal cannot succeed.

[29] The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

……………..

IG FARLAM
JUDGE OF APPEAL

CONCURRING

HOWIE	P
BRAND	JA
JONES	AJA
VAN HEERDEN	AJA