THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 415/04

In the matter between :

CITY OF CAPE TOWN
(CMC ADMINISTRATION) **APPELLANT**

and

W D BOURBON-LEFTLEY NO **FIRST RESPONDENT**
M M BOURBON-LEFTLEY NO **SECOND RESPONDENT**

CORAM : **HOWIE P, NAVSA, BRAND, VAN HEERDEN JJA**

***et* CACHALIA AJA**

HEARD : **31 AUGUST 2005**

DELIVERED : **15 SEPTEMBER 2005**

Servitude entitling farmer to draw water from the appellant's pipeline – maximum allocation exceeded – whether tacit term that farmer should pay for excess at 'going rate' – alternatively whether farmer liable in delict for excess water consumed.

JUDGMENT

BRAND JA/

BRAND JA:

[1] The Wemmershoek Dam near Paarl is one of the sources of drinking water for the inhabitants of the Cape metropole. Both the dam and the pipeline connected to it belong to the appellant. The respondents are the trustees of the Bourbon-Leftley family trust. The trust drew water from the pipeline for the irrigation of its fruit farm, Môrelig, in the Wemmershoek Valley. For the water so consumed the appellant claimed compensation from the trust in an amount of about R1,7m. When the trust refused to pay, the appellant instituted action against the respondents as its trustees in the Cape High Court. At the end of the trial before Griesel J, the claim was, however, dismissed with costs. The appeal against that judgment is with the leave of this court.

[2] The issues between the parties can best be understood against the factual background that follows. It all started in about 1950 when the appellant decided to build the dam across the Wemmershoek River. One of the preparatory steps it had to take was to come to some arrangement with

the owners of riparian farms who had hitherto drawn their water from the river for irrigation purposes. After some negotiation with those representing the riparian farmers, the appellant succeeded in reaching an agreement with them at a meeting held on 7 March 1950. All this appears from the minutes of that meeting introduced in evidence before the court *a quo.*

[3] The agreement reached at the meeting was eventually embodied in a document that was signed by the appellant and every individual riparian owner on 19 January 1952. One of the parties to the agreement was the trust's predecessor in title to the farm Môrelig. What the appellant agreed to, in essence, was to supply the riparian owners with a maximum allocation of water from the pipeline connected to the dam in exchange for taking away their riparian rights and as compensation for allowing a servitude pipeline over their properties. An overall quantity of 400 million gallons per annum was allocated to the farmers as a group. The allocation was made in three categories; a maximum of 240 million gallons free of charge and a further maximum of 160 million gallons at a rate of 1s per 1 000 gallons for the first half of 80 million gallons and 1s 6d per 1 000 gallons for the remaining half.

[4] Subsequently, this overall allocation was apportioned among the individual owners concerned and each apportionment registered, together with the other terms of the 1952 agreement, as part of a servitude of aqueduct against the title deeds of the individual properties. In the case of Môrelig, the registration took place in October 1964. According to the 1964 servitude the share of the overall allocation allotted to Môrelig, translated into metric terms, was a maximum of 151 536 kilolitres (or cubic metres) per annum divided into a free allocation of 90 920 kilolitres and a further 60 616 kilolitres at a discounted rate of 2,2c per kilolitre for the first half of 30 308 kilolitres and 3,3c per kilolitre for the remaining half.

[5] Other terms of the servitude provided that:

(a) the appellant would install and maintain the pipeline as well as a meter at the point of supply for the purpose of measuring the quantity of water drawn;

(b) the owner of Môrelig acknowledged that, save for the allocation in terms of the agreement, he would have no right to take water out of the Wemmershoek River or any of its tributary streams.

[6] On 6 November 1992 the trust took transfer of Môrelig from its predecessor in title, Le Fayet Operations CC. In consequence, the 1964

servitude became a binding agreement between the appellant and the trust. In all its subsequent dealings with the appellant, the trust was represented by the first respondent, Mr William Bourbon-Leftley ('Bourbon-Leftley'), although the farming operations on Môrelig were later taken over by his son, Mr William Bourbon-Leftley junior. At the time of the acquisition of Môrelig, Bourbon-Leftley had some 34 years experience in farming fruit for the export market as the owner of another farm, Loevenstein, in the district of Paarl.

[7] Môrelig was acquired through the trust to extend the fruit farming operations on Loevenstein. Shortly after acquisition, the trust therefore proceeded to replace the existing vineyards on the farm with fruit trees to produce plums and citrus for the export market. To that end, 40 hectares were placed under irrigation. On 18 February 1993 application was made, on behalf of the trust, to the appellant's city engineer, for the installation of a metered outlet of 150 millimetres from the pipeline. The reason advanced for the request was that the existing 80 millimetre outlet would not satisfy the requirements of the trust's new irrigation system. The application was approved by the engineer in March 1993. From then onward, the trust drew its allocation of water from the pipeline at two metered outlets. While water drawn from the old 80 millimetre outlet was primarily used for domestic

purposes, the water from the new 150 millimetre outlet was used for the irrigation of fruit trees.

[8] The appellant's officials stationed at the Wemmershoek Dam read the meters installed at these outlets on a regular basis and communicated their readings to the appellant's accounts department in Cape Town. Towards the end of 1993, Bourbon-Leftley was told by one of the senior officials at the Wemmershoek Dam, a Mr Young, that according to the appellant's readings, the trust was about to exceed its maximum allocation of water for that year. Bourbon-Leftley immediately started making arrangements to obtain additional water from other sources. Shortly thereafter, however, Young informed Bourbon-Leftley in writing that he had been mistaken in that the trust had only withdrawn some 60 000 kilolitres at that stage, which left about 30 000 kilolitres of its free allocation available for the remainder of that calendar year.

[9] As a result of this experience, Bourbon-Leftley, over the period from 1994 to 1998, regularly telephoned the officials at the appellant's accounts department in Cape Town, mostly speaking to a Mrs Riecherts, who furnished him with the monthly readings relating to water consumption on Môrelig. Throughout this period the monthly readings were recorded by

Bourbon-Leftley and totalled annually. These totals reflected consumption of far less water than the trust's annual allocation of free water. In fact, during some of those years it was as little as 33 000 kilolitres and it never exceeded 52 000 kilolitres in any given year. As a consequence, so Bourbon-Leftley testified, he ceased his practice of making these inquiries at the end of 1998.

[10] Unbeknown to the appellant's officials involved, including Mrs Riecherts, the readings obtained by the appellant and communicated to Bourbon-Leftley, were not correct. The errors resulted from a persistent misreading by the appellant's meter readers of the meter which was installed at the trust's new 150 millimetre outlet in 1993. The misreadings occurred because the meter readers had failed to multiply the reading on the meter by a factor of 10 as they were required to do by the instructions appearing on the face of the meter itself. This error was perpetuated until eventually discovered by one of the appellant's officials in about July 1999.

[11] With effect from July 1999 the metre was read correctly. These correct readings showed that the trust's consumption of water had exceeded, not only its free allocation, but its overall maximum allocation of 151 636 per annum by a substantial margin. However, these facts were

only communicated to the trust much later. Though water accounts were prepared by the appellant's account department on the basis of the correct readings since July 1999, problems were compounded by the fact that these accounts did not reach the trust because they were erroneously sent to the postal address of the previous owner of Môrelig, Le Fayet Operations CC.

[12] This state of affairs continued until 7 November 2001 when a final demand was hand-delivered, on behalf of the appellant, to Bourbon-Leftley junior on the farm. This was the first intimation received by the trust that its annual consumption of water exceeded not only its allocation of free water, but its overall allotment in terms of the 1964 servitude. Bourbon-Leftley thereupon immediately arranged for alternative sources of water for irrigation on Môrelig with the result that the trust did not exceed its overall allocation in 2002 while its excess use in 2003 was negligible.

[13] The final demand delivered to the trust was essentially for payment of the amount claimed in these proceedings, ie R1 696 758,58. It is alleged to be owing by the trust for the water consumed in excess of its maximum annual allocation over the period of three years between 1 January 1999 and 31 December 2001. According to the appellant's records that were

formally admitted by the respondents at the trial, the actual quantities used by the trust over that period were: 309 840 kilolitres during 1999, 348 629 kilolitres during 2000 and 265 852 kilolitres during 2001.

[14] The amount claimed is calculated on the premise that the trust is liable to pay for water used in excess of its overall quota of 151 636 kilolitres per annum at the appellant's so-called 'miscellaneous tariff plus 25%'. This, so the appellant alleged, is the rate paid, inter alia, by some riparian owners in a position similar to the trust for water consumed in excess of their overall allocations under the 1952 agreement. Although the respondents denied that the trust was liable to pay for its excess consumption at the alleged miscellaneous rate plus 25%, they admitted that, if the trust should be held to be liable to pay at all, and if that should be found to be the applicable rate, the appellant would be entitled to judgment in the amount claimed.

[15] The primary basis of appellant's claim as formulated in its particulars of claim relied on an alleged tacit term of the servitude agreement to the effect that:

'should the trust exceed its maximum annual allocation of water from the pipeline of 151 536 kilolitres, then the trust would pay the plaintiff for the excess water utilised at a

rate equivalent to that charged to other parties entitled to similar rights to draw from the pipeline.'

[16] The appellant also formulated an alternative claim which was founded in delict. Its allegations in support of this claim were, in the main, that the respondents were liable to it for the damages it had suffered as a result of the intentional, alternatively negligent, misappropriation of its water by the trust.

[17] The respondents disavowed liability on either of these grounds. With regard to the main claim they denied the existence of the alleged tacit term. In the alternative they pleaded that, if such a tacit term were found to exist, then the servitude must have been subject to two further tacit terms. In substance, these two terms seem to amount to the same thing, namely that the trust would only be liable to pay for excess water if the appellant had given it fair warning of such excess use.

[18] The court *a quo* found that the claim could not be sustained by either of the two causes of action upon which it was brought. The appellant's argument on appeal is that the court erred in that it should have held the trust liable on one of these alternative grounds.

TACIT TERM

[19] A discussion of the legal principles regarding tacit terms is to be found in the judgment of Nienaber JA in *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136H-137D. These principles have since been applied by this court, inter alia, in *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA) paras 22-25 and in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and another* [2004] 1 All SA 1 (SCA) paras 50-52. As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people, nor supplement their agreements merely because it appears reasonable or convenient to do so (see eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it

would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time (see eg *Alfred McAlpine* supra at 532H-533B and *Consol Ltd t/a Consol Glass* supra para 50). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

[20] In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term (see eg *Wilkins NO v Voges* supra at 143C-E; *Botha v Coopers & Lybrand* supra para 25).

[21] Reverting to the servitude agreement under consideration, it is clear, as I have said, that provision is made in express terms for the allocation of a prescribed volume of water free of charge. In addition, a further allocation

is made at discounted rates. Nothing is said, however, as to what would happen in the event of the property owner exceeding its overall allocation of water in all three categories. The appellant's case is not that the parties have applied their minds to such eventuality. What it contends for is that the parties did not think of this eventuality at all, but that, if at the time of the agreement the parties had been asked what would happen in this event, their unanimous response would have been that the owner would pay for the excess consumption at the going rate. The starting point of the appellant's argument in support of this contention was that, in the given situation, one of only three possible results could eventuate. First, the excess water could be provided at no cost. Second, the excess water could be provided at a cost and, third, the appellant could simply cut off the supply of water to the property.

[22] The first option, so the appellant's argument proceeded, can be disposed of on the basis that it would be completely unbusinesslike and incompatible with the express terms of the agreement. Thus far the argument is obviously sound. As to the third option, the appellant argued, such conduct on its part would constitute an interference with the owner's servitudinal rights which would entitle the owner to rely on the *mandament van spolie* (cf *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1)

SA 508 (A) at 513B-E and 516E-H; *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) paras 9 and 12). Which leaves the second option as the only realistic alternative. Once this is accepted, the argument concluded, logic dictates that the parties would inevitably have agreed that the owner would pay for excess consumption at the going rate.

[23] I am not persuaded by this line of reasoning. In my view it departs from a wrong premise. Acceptance of the proposition – doubtful in itself – that the appellant would be guilty of spoliation if it refused to supply the owner with more water than it was contractually entitled to, would not on its own justify the conclusion that the owner could therefore exceed its overall annual allocation with impunity, as long as it paid for the excess at the going rate. Otherwise stated, to say that the appellant would not be entitled to cut off the owner's water supply would not render a limitation of the owner's right of withdrawal of water to the quantity of its allocation, unenforceable. The appellant would be entitled to compel compliance with such limitation in other ways, for example, by cancelling the agreement – with or without a claim for damages – or by compelling specific performance through obtaining a prohibitory interdict.

[24] Upon being asked by the officious bystander what would happen if the owner exceeded its allocation, the third option available to the parties was therefore not, as suggested by the appellant, that the appellant would simply cut off the owner's water supply. Their real option was to respond that the owner was not entitled to exceed its overall allocation and that, if it did so, the appellant would have whatever remedies would be available to it in law. In fact, I believe that in all the circumstances this was the answer the officious bystander was most likely to receive from both parties; perhaps with the rider that if the owner needed more water it could be provided by the appellant, subject to availability, at a rate to be negotiated.

[25] There are several reasons why I think that the latter option represents the most likely answer the parties would have given. First, it appears from the minuted negotiations preceding the servitude agreement that it was not envisaged that the riparian owners would require any water in excess of their overall allocations. Second, as also appears from the same minutes, it was specifically pointed out by the appellant's representatives during these negotiations, that the prime purpose of the Wemmershoek Dam was to provide potable water to the inhabitants of Cape Town and not to supply the farmers of the Wemmershoek Valley with water for irrigation purposes. In the circumstances it is improbable, in my view, that the appellant would

have agreed to afford every riparian owner the right to claim unlimited quantities of water from the pipeline, albeit at 'the going rate'. Third, I find it unlikely, from the farmers' point of view, that they would have agreed to buy irrigation water at the going rate paid for drinking water by the inhabitants of Cape Town without even enquiring what that rate was likely to be. This unlikelihood is borne out, to an extent, by Bourbon-Leftley's conduct. Each time he was told that the trust was exceeding its overall allocation, he made alternative arrangements for irrigation water. Fourth, I find myself in agreement with the conclusion arrived at by the court *a quo,* that a tacit term entitling the riparian owners to claim more than the quantities allotted to them would be at odds with their express acknowledgement in terms of the servitude agreement that, apart from their allocation under the servitude, they were not entitled to any water from the Wemmershoek River or its tributary streams. Acceptance of the fact that the owner was not entitled to exceed its maximum overall allocation would obviously preclude any agreement on compensation for excess use. The parties could hardly be assumed to have concluded an agreement on the basis of what would constitute breach of contract by one of them.

[26] The appellant's further argument in support of the proposed tacit term was based on the evidence that other riparian owners in a position similar

to that of the trust had paid for water consumed in excess of their allocation at the appellant's 'miscellaneous rate plus 25%'. The difficulty with this argument is, however, that there is no indication as to why these farmers were prepared to pay this rate. Did they really do so by way of implementing what they thought to be a tacit term of the servitude? Or was it done pursuant to ad hoc arrangements between the appellant and those farmers? Without knowing the answer to these questions, the payments *per se* cannot sustain the inference contended for by the appellant. I therefore agree with the court *a quo*'s finding that the appellant had failed to establish the tacit term upon which its main claim relies.

THE DELICTUAL CLAIM

[27] The appellant's alternative cause of action formulated in delict – not strenuously pursued on appeal – was for damages resulting from the unlawful and intentional, alternatively negligent, misappropriation of its water by the trust. In support of the proposition that such an action is, in principle, available in our law, the appellant sought to rely on the judgment of this court in *Hefer v Van Greuning* 1979 (4) SA 952 (A) at 958H (cf also, eg Neethling, Potgieter & Visser *Law of Delict* 4 ed p 11; Van der Merwe *Sakereg* 2 ed p 357; Silberberg & Schoeman *The Law of Property* 4 ed (by Badenhorst, Pienaar & Mostert) p 244 *et seq*). I shall approach the matter,

without finally deciding the issue, on the assumption that this foundational proposition is true.

[28] A substantial part of the appellant's argument under this heading was attributed to a criticism of the court *a quo*'s conclusion that it could not find the trust's misappropriation to have been intentional. This conclusion was primarily based on the acceptance of the *ipse dixit* by the Bourbon-Leftleys, senior and junior, that they were unaware of the fact that the trust was consistently exceeding its overall allocation. The appellant's contention in this regard was that these declarations of good faith, especially on the part of Bourbon-Leftley senior, could not stand up to scrutiny. In support of this contention it pointed out that Bourbon-Leftley was a farmer of 34 years' experience in fruit farming; that he was well aware of the fact that the irrigation of fruit trees required at least 4 000 kilolitres per hectare annually and that he had planted 40 hectares of fruit trees on Môrelig. He must therefore have known that the trust required a minimum of some 160 000 kilolitres per annum for its irrigation purposes. Consequently, he must have appreciated that the measurements of between 33 000 and 52 000 kilolitres per annum that he obtained from Mrs Riecherts could not possibly be accurate. There is considerable merit in this argument. Of course, the argument gains substantial force when the alternative yardstick of the

reasonable person in Bourbon-Leftley's position, which would satisfy the element of negligence as a requirement for Aquilian liability, is applied. However, the view that I hold on the outcome of the appeal renders it unnecessary to arrive at any final conclusion on the issue of whether or not the misappropriation by the trust can be ascribed to the guilty minds of those acting on its behalf.

[29] The court *a quo*'s main reason for dismissing the appellant's delictual claim was that it had failed to prove any damages. I agree with this conclusion. The appellant's case is that, but for the misappropriation by the trust, it would have sold the quantity of the excess water consumed to other users at its going rate. Bourbon-Leftley's undisputed evidence was, however, that during the three year period under consideration, the Wemmershoek Dam was never empty. Without more, this would give rise to the inference that, despite the excess use of water by the trust, the appellant's water supply still exceeded the demand of its potential purchasers. In the absence of any evidence as to the level of the dam immediately after the next rains, one simply does not know whether the excess water that was used by the trust would have flowed down to the sea the next time the dam reached its maximum capacity. If it did, the appellant would not have suffered any loss. It follows that, in my view, the appellant's

claim was rightly disallowed on both the contractual and the delictual bases advanced.

[30] For these reasons the appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

Concur:

HOWIE P
NAVSA JA
VAN HEERDEN JA
CACHALIA AJA