SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 81/2018

In the matter between:

STEPHANUS DE LANGE NO **APPELLANT**

and

THE MINISTER OF WATER AND

ENVIRONMENTAL AFFAIRS **RESPONDENT**

Neutral citation: *Stephanus de Lange NO v The Minister of Water Environmental Affairs* (81/2018) [2019] ZASCA 59 (17 April 2019)

Coram: Navsa AP, Leach and Mocumie JJA, Mokgohloa and Dlodlo AJJA

Heard: 6 March 2019

Delivered: 17 April 2019

Summary: Prescription – water use rights in terms of the National Water Act 96 of 1998 – appellant's water use not an unrestricted real right – appellant's delictual cause of action arising when canals the respondent failed to maintain became inoperable – no on-going breach of appellant's right to water – claim prescribed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Teffo J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Leach JA and Mokgohloa AJA (Navsa AP, Mocumie JA and Dlodlo AJA)

[1] The appellant is the executor in the estate of the late Petrus Willem Terblanche (the deceased) who, during his lifetime, was the owner of a certain piece of immovable property more formally known as Portion 97 of the Farm Cornelia, in the district of Koppies. The deceased instituted action in the Gauteng Division, Pretoria, alleging the respondent was liable to him for damages arising out of a failure to maintain an irrigation channel. This he alleged had led to him being unable to water crops on his farm, causing him loss. The respondent, in pleading, raised a special plea of prescription. This was heard as a separate issue under Uniform rule 33(4) and decided in favour of the respondent. The court *a quo* refused leave to appeal but such leave was granted by this Court. On the subsequent death of the deceased, the appellant was substituted in his stead.

[2] The farm lies downstream of the Koppies Dam and within the area of the Rhenoster River Government Water Scheme (the Scheme) established in terms of s 73 of the Water Act 54 of 1956. The respondent, the Minister of Water and Environmental Affairs, is responsible for and has authority over the nation's water resources and their use, including the equitable allocation of water for its beneficial use and the redistribution. Although the Water Act 54 of 1956 was repealed by the National Water Act 36 of 1998 (NWA) on 26 August 1998, the deceased had exercised a lawful water use for more than a period of two years under the former Act until the NWA came into operation. That being so, by reason of the provisions of s 32(10)*(a)*(i) of the NWA, he enjoyed an existing lawful water use as envisaged by that Act.

[3] Although the farm is 457,114 hectares in extent, in terms of the Scheme the deceased was only entitled to irrigate an area of five hectares. Prior to 2003, he did so by abstracting water from the Koppies dam which ran by way of a mostly unlined irrigation canal to the farm. When he testified, the appellant stated that he used the water to irrigate lucerne which, in turn, he used to feed a dairy herd. He stated that when he stopped irrigating for the reasons set out below, he resorted to using dry land lucerne which was not as beneficial for his cattle as the irrigated lucerne had been; this caused a fall-off in his milk production and, after having been initially forced to reduce the number of his cattle, he was eventually forced to give up dairy farming altogether. This was totally at odds with his allegations in his particulars of claim where no mention was made of any dairy farming activities. Instead he alleged that he had been growing grain sorghum on the five hectares of land that he was entitled to irrigate and that as a result of his not being able to irrigate for several years, his

production was less. Thus he claimed the value of the tonnage of grain sorghum that had been lost.

[4] Whatever the truth may be, the issue is whether the deceased was entitled to claim for his loss, whether arising from dairy farming or grain sorghum production. Importantly, in this regard, it appears to be common cause that by the year 2003, irrigation on the farm had ceased. During 2002, the area in which the deceased farmed started to experience drought. On 20 January 2003, water restrictions were imposed on water users within the Scheme and, during the course of that year, the operation and maintenance of the irrigation canals ceased. As a result, during the course of that year they reached such a state of dilapidation that they could no longer be used to supply water to the deceased's farm. At the same time the drought tightened its grip and from 2004 to 2005 no water was, in any event, available in the Koppies Dam to be supplied to the deceased's farm, even had the Scheme been operating.

[5] The drought continued until end of January 2005. It started to rain during February 2005. The respondent did not resume water supply to the property, despite the fact that the Koppies dam was approximately half full. By that stage the Scheme had for all practical purposes come to an end. Even though there was water available, it was not being used for purposes of the Scheme. The irrigation canals were so dilapidated that they could not be used and, importantly, the deceased and other members of the Scheme appear to all intents and purpose, to have abandoned it. Certainly the deceased had ceased to pay any of the dues and levies he was obliged to pay as a water user under the Scheme.

[6] In 2005, the Free State Agriculture Association, acting on behalf of the appellant and other water users of the Scheme, applied to the national Department of Water and Forestry for drought relief for the years 2003/2004 and 2004/2005. The application was approved and gazetted on16 March 2007 and resulted in water users of the Scheme becoming entitled to a rebate with regard to the depreciation component (100%) and the operation and maintenance component (70%) of the water use charges with effect from 6 August 2007 but with retrospective effect for the 2003/2004 and 2004/2005 years – the operating and maintenance component increasing to 100% in the latter period. However, the deceased had already accumulated an account of almost R44 000 for unpaid water use charges by January 2005, and he continued not to pay any charges for the years that followed. Nor did he at any stage seek to be supplied with water under the Scheme. As we have said, the Scheme was treated by all as no longer operating.

[7] Then, in February 2009, the deceased together with other water users on the Scheme, launched an application for a *mandamus*, seeking an order that the respondent be ordered to repair and maintain the canals and resume water supply. They further applied for a declarator that no water use charges be levied from 9 February 2006 until the date upon which the respondent resumed to supply them with water. The application was settled on the basis that the Scheme was discontinued, and the respondent paid the appellant and other members of the Scheme certain amounts of money in lieu of the deregistration of their respective water use rights. This was duly done by 6 October 2010.

[8] Shortly thereafter, the attorneys who had represented the deceased in the recently settled proceeding, and acting on a contingency basis (so we were informed from the Bar), instituted these proceedings on behalf of the deceased,

claiming damages allegedly sustained as a result of the respondent not having supplied water to the farm from 2007 to 2010. In his particulars of claim, the deceased claimed amongst others, that during 2003 the officials of the respondent had suspended water supply to his farm, thereby infringing his water use rights; and that he, as a result could not irrigate the five hectares and had therefore suffered damages in the amount of R250 000 – being the alleged value of the sorghum lost. The claim of the deceased was but one of six brought by farmers in the Scheme who had just sold their water rights, but was heard by the court *a quo* as a test case.

[9] This was the claim the respondent alleges had prescribed before the issue of summons. Although the damages were calculated within three years of the summons, the respondent contended that the cause of action, namely the neglect of the irrigation canals which the respondent had been obliged to maintain, had arisen by 2003 as they were by then not capable of being used. This essentially was the argument upheld in the court *a quo*.

[10] The appellant sought to avoid the obvious consequence of this by arguing that the deceased's claim had been to enforce a right which was an incident of ownership, namely a riparian owner's right to abstract water, limited though it is by statute. As a real or statutory right, and not a mere personal right, so the argument went, it was a right which did not prescribe. Accordingly, there had been an on-going or continuous breach of the deceased's such right during the period 2007 to 2010 and his claim for loss suffered during that period was not susceptible to prescription.

[11] As already mentioned, the deceased enjoyed a lawful water use under s 32 of the NWA when that Act came into operation. However, s 39 of the NWA provides:

'(1) A responsible authority may, subject to Schedule 1, by notice in the Gazette-

(a) generally;

(b) in relation to a specific water resource; or

(c) within an area specified in the notice,

authorise all or any category of persons to use water, subject to any regulation made under section 26 and any conditions imposed under section 29.'

[12] As is apparent from this, the deceased did not have carte blanche to abstract as much water as he desired or to do therewith what he wanted. As set out in the preamble to the NWA, water is a scarce national resource and national government is responsible for its use, including its allocation. A brief glance at the NWA shows the extent of control vested in the State over water. As the preamble to the NWA records:

'Water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle. While water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources. The national government is responsible and has authority over the nation's water resources and their use, including the equitable allocation of water for the beneficial use, the redistribution of water, and international water matters. The ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users.'

[13] Chapter 4 of the NWA, ss 22 to 27 in particular, prescribe restrictions upon the permissible use of water. In the present case, the deceased was only allowed to abstract a certain quantity of water and to irrigate only five hectares

of the farm. But regulations under s 26 and conditions under s 29 also applied. Simply put, he had to request to be allocated a water quota and had to pay various charges, both in respect of the quantity of water used, the area to be irrigated and in respect of fixed capital and operating costs (in respect of which the drought relief we have mentioned operated.) The deceased did none of these. He did not ask the Scheme for water, either using the prescribed procedures or at all, and he did not pay any of the charges envisaged in ss 56, 57, 58 and 59 of the NWA.

[14] The deceased testified that before he could be supplied with water, he would have had to complete a form in which he would have indicated the amount of water he needed and for how many days. He would have submitted the form to the respondent's officials. As stated above, there is a great demand on water which is itself a scarce resource. It seems to us, therefore, that it would be appropriate for the respondent to know how much water is needed by how many water users in order for the respondent to manage the supply of water to them. Be that as it may, the appellant did not complete the form and failed to exercise such right as early as in 2003 when the supply of water was stopped.

[15] We accept for present purposes that the water use right held by the appellant did not constitute a mere contractual right to abstract water – *Impala Water Users Association v Lourens NO & others* 2008 (2) SA 495 (SCA) para 18 – and that a failure to exercise such right did not lead to it becoming prescribed. However it is also clear that, whatever its precise nature may have been, such right to use water was not unconditional. Rather it was dependent upon the deceased complying with the various preconditions that entitled him to receive water, including, in particular, him applying for water as prescribed and paying the charges that were levied (which were required inter alia to maintain the infrastructure of the Scheme). Not only did the deceased fail to pay any

water charges during the period 2007-2010 to which his claim relates, but he never sought to abstract water during that period either. Indeed both he and the authorities treated the Scheme effectively as a thing of the past and his water use right as dormant and non-existent. In the light of the above, the appellant's submissions that the respondent bore an on-going statutory duty to maintain the canal and distribute water, and that its failure to do so was an on-going wrong so that the deceased's claim has not prescribed, falls to be rejected.

[16] Indeed, it would in these circumstances be irrational to accept that the deceased became entitled to recover damages for a breach of a right to use water, whatever the nature of that right might be, which he had not in any way purported to exercise during the years in question. For these reasons we are of the view that there is no merit in the suggestion of an actionable on-going breach of the appellant's water use right, and the deceased's claim in that regard must fail.

[17] Consequently, and at best for the deceased, there is a claim for damages flowing from an omission on the part of the respondent to maintain the water canal which had rendered it inoperative by 2003. For present purposes (but without deciding the issue) even if it is assumed that such omission was negligent, any claim for damages caused thereby (which would constitute a 'debt' as envisaged by the Prescription Act) had arisen by 2003.

[18] Section 12(3) of the Prescription Act 68 of 1969 provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. There is no suggestion that the deceased was not aware of the degradation of the irrigation and canals that

had taken place by 2003 nor of the fact that the State had allowed this to happen. It was the failure to maintain the canals that led to them becoming inoperable, and that was when the cause of action arose. It is also not suggested that the prescriptive period for a delict such as this is anything other than three years. In these circumstances we are of the view that the court *a quo* correctly upheld the plea of prescription.

[19] The appeal is dismissed with costs, such costs to include the costs of two counsel.

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L E Leach

Judge of Appeal

and

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F E Mokgohloa

Acting Judge of Appeal

Appearances:

For the Appellant:	J H A Saundera
	Instructed by:
	Taute, Bouwer & Cilliers Incorporated, Pretoria
	Honey Attorneys, Bloemfontein
For the Respondent:	M P D Chabedi (with her A Thomson)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein