THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case no: 373/05

In the matter between:

FIRST RAND LIMITED t/a RAND MERCHANT BANK APPELLANT	FIRST
BLYDE RIVER WATER UTILITY COMPANY (PTY) LTD APPELLANT	SECOND

and

DIEDERICK ARNOLDUS SCHOLTZ N O RESPONDENT	FIRST
GERT JACOBUS SCHOLTZ N O RESPONDENT	SECOND
PETRUS PAULUS ROOS SCHOLTZ N O RESPONDENT	THIRD
PIETER CHRISTIAAN BARWISE RESONDENT	FOURTH

Coram: HARMS, FARLAM, NUGENT JJA COMBRINCK *et* MALAN AJJA

Date of hearing: 24 August 2006

Date of delivery: 11 September 2006

Summary: *Mandement van spolie – statutory water rights – contractual use of pipeline – whether closure of pipeline spoliation*

Neutral citation: This judgment may be referred to as First Rand Ltd v Scholtz NO [2006] SCA 98 RSA

JUDGMENT

MALAN AJA/….

MALAN AJA:

[1] This is an application for leave to appeal which has been referred for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 against the order of Bertelsman J; (1) declaring that the termination of the water supply of the respondents through the Lower Blyde River Pipeline Network by the appellants on 31 December 2004 constituted a spoliation; (2) declaring that any such future termination without a final order of court would constitute a spoliation; (3) interdicting the appellants from terminating the said water supply without a final court order; and (4) ordering the appellants to pay the costs of the application. Bertelsman J refused leave to appeal, hence this application.

[2] The pipeline is a steel and concrete construction some 130 kilometers long distributing water from the Blyde River Dam through an irrigation network to farmers and other users over an area of about 460 square kilometers. The first appellant, First Rand Ltd, financed the construction of the pipeline and the second appellant, Blyde River Water Utility Company (Pty) Ltd, a wholly-owned subsidiary of one of the first appellant's associated companies, is in control of the pipeline, its infrastructure, operation and maintenance. The first three respondents are the trustees of a trust (the 'Trust'). Both the Trust and the fourth respondent own properties in the area serviced by the pipeline and use the water for their farming operations.

[3] The flow of water from the pipeline to the individual farmers is controlled from a control room situated close to the Blyde River Dam wall and containing an isolating valve. No water can be released into the pipeline when the valve is closed. The second appellant controls the operation of the valve. On each of the properties provided with water through the pipeline an irrigation off-take houses the equipment necessary to control the flow of water to those properties. The supply of water to each of them is regulated by control valves in the irrigation off-takes which can be controlled either manually or remotely by telemetry signals. Some time after midnight on 31 December 2004 the water supply to the respondents was cut off by the appellants' shutting off the control valves in the irrigation off-takes leading to their properties.

[4] By agreement reached on the next day the supply of water through the pipeline to the properties of the respondents was restored pending resolution of the application by the respondents for restoration *ante omnia*. The respondents have as a consequence amended their notice of motion to seek, not a restoration order, but an order declaring that the conduct of the appellants constituted spoliation. The essence of the relief sought in prayer 1 therefore remained the same, ie whether the appellants' conduct in terminating the water supply on 31 December 2004 constituted spoliation. The respondents have since the filing of

their practice note and heads of argument abandoned paragraphs 2 and 3 of the order appealed against. The matter is of considerable practical importance to the parties and counsel for the respondents correctly did not proceed with the argument that the appeal would have no practical effect or result as envisaged by s 21A of the Supreme Court Act 59 of 1959.

[5] The respondents are members of the Blyde River Water Users Association (the 'WUA'), the successor to the Blyde River Irrigation Board which is responsible for the supply of water to the respondents.[1] Before the construction of the pipeline the Irrigation Board and its successor, the WUA, supplied water to those entitled to it by means of a canal system and, to that effect, servitudes were registered in favour of the Irrigation Board over the land of the water users. Because the canal system was inefficient the Irrigation Board in March 1995 initiated a project to construct an irrigation network by means of the pipeline, and the first appellant was approached by the Department of Water Affairs and Forestry to finance it. The Minister approved the construction of the pipeline and first appellant provided the finance for it.

[6] To give effect to the project a series of agreements was entered into between the first appellant and the Irrigation Board: a partnership agreement between them; a construction agreement in terms of which the Irrigation Board undertook to oversee the construction of the pipeline as agent for the partnership; a works lease agreement in terms of which the completed works were leased to the Irrigation Board against periodic rental payments; and a land lease agreement in terms of which servitudes over the land of the water users in favour of the Irrigation Board were leased to the partnership. For reasons that are not material the Irrigation Board withdrew from the project and the first appellant resolved to continue with the project as principal, completed the construction of

[1] Section 98(7) of the National Water Act 36 of 1998 provides that '[u]pon the publication of a notice under subsection (6), every property, right and liability of the board becomes a property, right and liability of the relevant water user association'. The Irrigation Board was transformed into the WUA by GN 42, *GG* 23037, 25 January 2002.

the pipeline and appointed consulting engineers to operate it. The right of the appellants to possess, operate and occupy the pipeline as well as the validity of the agreements in terms of which the pipeline was constructed and its ownership are the subject of other contested proceedings between the parties.

[7] From March 2003 water was supplied to certain farmers within the irrigation area by way of the pipeline pursuant to interim agreements concluded by the first appellant with each of them. In January 2004 eighty farmers, including the Trust and the fourth respondent, each concluded an agreement known as the Lower Blyde River Irrigation Pipeline Water Conveyance Agreement with the second appellant governing the conveyance of water to them against payment of a fee for the period until 31 December 2004. The agreements expired on that day. Because the parties were unable to agree on the fee payable for the conveyance of water for 2005 the appellants indicated that they would cease such deliveries from 1 January 2005 and indeed did so after midnight on 31 December 2004.

[8] The relevant terms of the Water Conveyance Agreement are the following:

‘3. Use

3.1 The water user requires the use of the pipeline for the conveyance by the water user for primary purposes on the farm/property specified in the schedule in respect of that number of hectares specified in the schedule (“the listed hectarage”).

3.2 The water utility company [the second appellant] agrees, subject to the terms and conditions set out in this agreement, to make use of the pipeline available to the water user for conveyance by the water user of the water which the water user requires in the manner and to the property referred to in clause 3.1, and the water user accepts such use from the water utility company.

4. Duration

The right of the water user to use the pipeline for the conveyance of water by the water user in terms of this agreement -

4.1 shall commence on 1 January 2004 (“the commencement date”);

4.2 shall, unless terminated earlier in terms of this agreement, terminate on 31 December 2004.

5. Consideration

5.1 As consideration for the use by the water user of the pipeline for the conveyance of water by the water user in terms of this agreement, the water user shall pay to the [second appellant] R 193 per hectare of the listed hectarage per month.’

[9] The respondents allege that they or their predecessors enjoyed rights to water under the repealed Water Act 54 of 1956 and that their properties were reflected in the schedule drawn by the Irrigation Board as containing rateable areas in respect of the Board’s irrigation district and registered in terms of s 88 of that Act.[2] These properties were subject to water charges levied by the Irrigation Board on the basis of their total rateable areas. The Minister of Water Affairs determined in 1957 that 9900 cubic metres water per hectare could be supplied annually in respect of each rateable hectare of land on the properties in question.[3] These rights, they allege, were ‘subsumed’ into rights under the National Water Act 36 of 1998 and their use of such water was authorized in terms of s 22(1)(a)(ii) read with s 32 of the 1998 Act as a ‘continuation of an existing lawful water use’.[4]

[2] See s 88(1)(b) and (4) of Act 54 of 1956.

[3] GN 1207, *GG* 10758, 5 June 1987.

[4] Section 32(1) defines ‘existing lawful water use’ as a water use ‘(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which – (i) was authorized by or under any law which was in force immediately before the date of commencement of this Act . . .’. Section 34 provides that (1) ‘[a] person, or that person’s successor-in-title, may continue with an existing lawful water use, subject to – (a) any existing conditions or obligations, attaching to that use . . .’.

[10] The respondents allege that interference with these rights, their 'statutory water rights', constituted a spoliation and that the supply of water to their properties is an incident of the occupation and farming operations and therefore incidental to the physical occupation of the properties. They aver that they had undisturbed access to delivery of the water from the Blyde River and Blyde Dam or *quasi possessio* of the water supply through the pipeline and need not in spoliation proceedings establish the rights relied upon nor show that they had a right to use the pipeline. *Quasi possessio*, they submitted, is established by the physical use of the water: the water flows in the pipeline by gravitation and, provided the pipeline remains open, there is a continuous supply of water to their properties.

[11] Bertelsman J upheld the respondents' contentions and said:

'Regarding the nature of the [respondents'] rights, Mr Maritz SC emphasized on behalf of the [respondents] that their water rights include the right to the use of the water. This in turn depends upon the fact that applicants' farms have been registered under the irrigation scheme aforesaid.

The right to the use of the water is clearly associated with and is dependent upon the possession of the land that has been registered for irrigation.

The right to water that applicants enjoy, however, defined, is an incident of the possession of each farm as defined in *Impala Water Users Association v Louwrens NO and Others* [2004] 2 All SA 476 (SCA).

Applicants' right to water is not only contractual. Indeed had they not possessed land registered in terms of the irrigation scheme, first respondent would not have been interested in entering into any contract with the applicants. Applicants' rights to water are therefore of a *quasi-possessory* nature and capable of protection by the *mandement of spolie*.'

He characterized the respondents' entitlement as a quasi possessory right to the continued supply of water. The issue, he said, was whether the rights of the respondent consisted of more than a contractual claim for the delivery of water through the pipeline. In finding for the respondents he remarked that it was common cause that the respondents had some or other right to water against the government (and against the WUV since early 2002) although the appellants denied knowledge of the exact nature of the rights.

[12] The *mandement van spolie* is a remedy to restore to another *ante omnia* property dispossessed 'forcibly or wrongfully and against his consent'.[5] It protects the possession of movable and immovable property as well as some forms of incorporeal property.[6] The *mandement van* spolie is available for the restoration of *quasi possessio* of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the *status quo ante* and not the determination of the existence of the right.[7] The *quasi possessio* consists in the actual exercise of an alleged right[8] or as formulated in *Zulu v Minister of Works, Kwazulu, and others*[9] in 'die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word'.

[5] *Nino Bonino v De Lange* 1906 TS 120 122 approved in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) 511H–512B.

[6] *Nino Bonino v De Lange* above 122; *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N) 640H–642D.

[7] *Bon Quelle* 513B–516C approving the view of Duard Godfried Kleyn *Die mandement van spolie in die Suid-Afrikaanse reg* LLD dissertation University of Pretoria (1986) p 395 that to require proof of the right would entail 'dat die hof op die meriete van die geskil sal moet ingaan, wat ontoelaatbaar is in die lig van die karakter van die mandement as besitsremedie.' Also *Van Wyk v Kleynhans* 1969 (1) SA 221 (GW) 223D-H.

[8] *Bon Quelle* 514I.

[9] 1992 (1) SA 181 (D) 188C.

[13] The *mandement van spolie* does not have a 'catch-all function' to protect the *quasi possessio* of all kinds of rights irrespective of their nature.[10] In cases such as where a purported servitude is concerned the *mandement* is obviously the appropriate remedy,[11] but not where contractual rights are in dispute[12] or specific performance of contractual obligations is claimed:[13] its purpose is the protection of *quasi possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its *quasi possessio* is deserving of protection by the *mandement*.[14] Kleyn[15] seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a name plate to a wall[16] regardless of whether the alleged right is real or personal.[17] That explains why possession of 'mere' personal rights (or their exercise) is not protected by the *mandement*.[18] The right held in *quasi possessio*

[10] Duard Kleyn 'Possession' in Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 819 at p 830; JC Sonnekus 'Mandement van spolie en ongeregistreerde serwitute vir water' 2006 *TSAR* 392 p 400; MJ de Waal 'Naidoo v Moodley 1982 4 SA 82 (T)' 1984 (47) *THRHR* 115 p 118.

[11] *Bon Quelle* 514D-E and see *Zulu v Minister of Works Kwazulu* 188D.

[12] *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (NC) 255B-C; *Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Koöperatiewe Maatskappy Bpk* 1964 (3) SA 601 (T) 607A-B. Cf *Slabbert v Theodoulou and another* 1952 (2) SA 667 (T).

[13] *Kotze v Pretorius* 1971 (4) SA 346 (NCD) 350D-E.

[14] See the approach of PC Combrinck J in *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N) 642D–643C.

[15] *Die mandement van spolie in die Suid-Afrikaanse reg* above 393-394; Kleyn 'Possession' above 830 and PJ Badenhorst, Juanita M Pienaar, Hanri Mostert assisted by Marisa van Rooyen *Silberberg and Schoeman's The Law of Property* 4 ed (2003) p 275.

[16] *Shapiro v South African Savings & Credit Bank* 1949 (4) SA 985 (W) 991.

[17] Duard Kleyn 'Ntshwaqela v Chairman Western Cape Regional Services Council 1988 3 SA 218 (K)' 1989 *De Jure* 154 pp 162-163.

[18] *Impala Water Users Association v Lourens NO and others* [2004] 2 All SA 476 (SCA) 481*a-b*; *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) 314C-D; *Zulu v Minister of Works, Kwazulu, and Others* 1992 (1) SA 181 (D) 190F-I; *Plaatjie and Another v Olivier NO and Others*

must be a ‘gebruiksreg’ or an incident of the possession or control of the property.

[14] This is illustrated by *Telkom SA Ltd v Xsinet (Pty) Ltd*[19] a case that concerned Telkom’s supply of a telephone and bandwidth system to Xsinet to enable the latter to conduct its business as an internet service provider. Telkom alleged that Xsinet was indebted to it in respect of one of the other services provided by it and disconnected Xsinet’s telephone and bandwith system. There was no suggestion that Telkom had interfered with Xsinet’s physical possession of its equipment nor that it had entered onto the premises of Xsinet to do so. Jones AJA[20] did not accept that the use of the bandwith and telephone services constituted an incident of the possession of the property as the use of water and electricity may in certain circumstances be even though these services were used on the premises.[21] There was no interference with Xsinet’s physical possession of the equipment and there was no evidence that it was ever in possession of any of the mechanisms by which the equipment was connected to the internet. He remarked[22] that it would be both artificial and illogical to conclude that the use of the telephone, lines, modems or electrical impulses gave Xsinet possession of the connection of its corporeal property to Telkom’s system. He rejected counsel’s contention that the *quasi possessio* of the right to receive Telkom’s services could be restored by the *mandement*. This right, he said,[23]

‘is a mere personal right and the order sought is essentially to compel specific performance of a

1993 (2) SA 156 (O) 159J–160G.

[19] 2003 (5) SA 309 (SCA).

[20] At 314B-C para 12.

[21] See eg *Naidoo v Moodley* 1982 (4) SA 82 (T) and the discussion by JC Sonnekus ‘Mandement van spolie - Kragtige remedie by kragonderbreking’ 1985 *TSAR* 331 p 337 and MJ de Waal ‘Naidoo v Moodley 1982 4 SA 82 (T)’ 1984 (47) *THRHR* p 115 and cf *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) 620E-G.

[22] At 314E-F para 13.

[23] At 314G-H para 14.

contractual right in order to resolve a contractual dispute. This has never been allowed under the mandement van spolie and there is no authority for such an extension of the remedy.'

[15] *Impala Water Users Association v Lourens NO and Others*[24] was an appeal against a decision of the High Court granting a spoliation order directing the appellant to remove locks, chains and welding works from certain sluices and to restore the flow of water to reservoirs on the respondents' farms. There was a dispute between the parties concerning the legality of certain water charges assessed by the appellant and relating to the costs of financing the construction of a dam. Although proceedings to recover these charges were pending the appellant decided to exercise its powers in terms of s 59(3)(b) of the National Water Act 36 of 1998 and restricted the flow of water to the respondents by locking the sluices. The first question the court had to consider was whether the rights on which the respondents relied were merely contractual. Farlam JA said:[25]

'[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 (*supra*) 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 . . . is not applicable.

[24] [2004] 2 All SA 476 (SCA).

[25] At 480*f*-481*a*.

[19] The facts of this case also differ in another material respect from those in the *Xsinet* case. There it was held . . . 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.'

[16] The respondents' rights, whether they be described as statutory rights to water or rights to a water supply or as *quasi possessio* of a water supply, may well be incidents of their possession or control of their properties. However, what the respondents were dispossessed of was not any of these rights but of an erstwhile contractual right that expired on 31 December 2004 against the appellants to convey their water entitlements. This right was and is no incident of the possession or control of their properties but a contractual right that came about long after the respondents became entitled to their statutory water rights. This conclusion is illustrated by the very contentions advanced by the respondents in their founding affidavit where they refer not only to the agreements entered into with the second appellant for the conveyance of water that expired on 31 December 2004 but also to water supply agreements they have concluded subsequently with the WUV and effective from 1 January 2005. The source of any rights the respondents may have had to the use of the pipeline is contract. They were deprived not of the *quasi possessio* of their statutory water rights which they still have and may exercise in any manner they wish but of an expired contractual right for the conveyance of water through the pipeline. Any obligations the appellants had to the respondents and any rights the latter had in

this respect terminated when the Water Conveyance Agreements with them expired. These rights, arising from contract, are not incidents of the possession or control of their properties but were mere contractual rights relating to the use of the pipeline. The parties could just as well have agreed that the appellants would convey water to the respondents by means of a fleet of water trucks. Neither the use of the pipeline nor use of the fleet of trucks would have been an incident of the possession or control of the properties of the respondents.

[17] It follows that leave to appeal should be granted and the appeal upheld. The following order is made –

(1) the application for leave to appeal is granted and the appeal is upheld with costs, including the costs of two counsel;

(2) the order of the court a quo is set aside and replaced with the following order

> 'The application is dismissed with costs, including the costs of two counsel.'

FR Malan

Acting Judge of Appeal

CONCUR:

HARMS JA

FARLAM JA

NUGENT JA

COMBRINCK AJA