IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13082/2020

In the matter between:

PHILIPPUS JAKOBUS VILJOEN (SNR) NO First Applicant

(in his capacity as co-trustee of the PJ VILJOEN BOERDERYTRUST)

PHILIPPUS JAKOBUS VILJOEN (JNR) NO Second Applicant

(in his capacity as co-trustee of the PJ VILJOEN BOERDERYTRUST)

ARNOLDUS JACOBUS STOFBERG NO Third Applicant

(in his capacity as co-trustee of the PJ VILJOEN BOERDERYTRUST)

PHILIPPUS JAKOBUS VILJOEN (JNR) NO Fourth Applicant

and

HENNIE DU PREEZ Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 16 NOVEMBER 2021

MANGCU-LOCKWOOD, J

I. INTRODUCTION

[1] This is an application to compel compliance with two orders of this Court which were granted on 25 June 2014 (per Gamble, J under case number 9833/14) and 13 December 2016 (per Davis, J under case number 8067/2016); to declare the respondent in contempt thereof; and to interdict the respondent from assaulting and threatening the fourth applicant. Although the applicant initially sought the relief in the form of a rule *nisi* and interim relief, by the time the matter appeared before me, final relief was sought.

[2] The parties are farming neighbours who have been embroiled in litigation for a considerable period of time. The applicants represent a trust referred to as the Viljoentrust, which owns De Liefde the farm. The respondent occupies Kanonkop, Dennelaan and Bergplaas, and has been in the process of buying them.

[3] The litigation between the parties involves a water source that serves De Liefde, Kanonkop and Dennelaan. The water source is a stream known as Watervalstroom, which flows from an upper source, the Donkerkloofstroom. The origin of the water is a mountainous area from which the water flows in a southerly direction over Bergplaas towards Kanonkop, Dennelaan and then De Liefde.

[4] The comprehensive background to this matter is set out in the judgment of Davis, J of 13 December 2016 (*"the 2016 Order"*), which was a sequel to the 2014 order granted by Gamble J (*"the 2014 Order")*. Both of these orders were interim orders pending finalisation of action proceedings which are pending under case number 15076/14.

II. APPLICABLE LAW

[5] Since what is now sought is final relief, the applicants are required to establish a (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy.

[6] Irreparable injury, though relevant in the context of interim interdicts, is not a requirement for the grant of a final interdict. A clear right is a matter of substantive law. In respect of a vindicatory claim it is presumed, until the contrary is shown, that the applicant will suffer irreparable harm, absent an interdict.[1]

[7] As regards the resolution of disputes, motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.[2]

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[1] *Stern & Ruskin NO v Appleson* 1951 (3) SA 800 (W).

[2] *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) paras [26] – [27].

[8] It is well-established under the *Plascon-Evans*[3] rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

[9] It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[4]

[10] On the other hand, it is equally undesirable for a court to take all disputes of fact at their face value.[5] If this were done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.[6] For example, a hollow denial or a detailed but fanciful and untenable version does not create a dispute of fact.[7]

[11] In every case the court should examine the alleged disputes of fact and determine whether in truth there is a real[8] issue of fact that cannot be satisfactorily resolved without the aid of oral evidence. Whether a factual dispute exists is not a discretionary decision; it is a question of fact and a jurisdictional pre-requisite for the

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[3] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* [2008] ZACC 13; 2008 (2) SACR 421 (CC) para 8-10; *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) paras [26] – [27].
[5] Harms *Civil Procedure in the Supreme Court*, Butterworths B6.45.
[6] *Petersen v Cuthbert & Co Ltd* 1945 AD 420 428.
[7] *Truth Verification Testing Centre CC v PSE Truth Detection Centre CC* 1998 (2) SA 689 (W) 698; *Rosen v Ekon* [2000] 3 All SA 23 (W) 39; *Ripoll-Dausa v Middleton NO* [2005] 2 All SA 83 (C), 2005 (3) SA 141 (C).
[8] *Peterson v Cuthbert & Co Ltd supra* 429; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) pars 234-239.

exercise of the discretion given by the rule.[9] It is not a question of any difference of character between the various kinds of claims being enforced, but a question of the proper method of determining in each case the facts upon which any claim depends.

III. CONTRAVENTION OF THE 2016 ORDER

[12] The events resulting in the 2016 Order were that in 2015 the respondent had opened an old, unused man-made water channel which the parties referred to as 'the furrow', and used it to extract water from the Donkerkloofstroom into a large underground pipe that he had laid over Bergplaas, to convey water directly to Kanonkop.

[13] The 2016 Order ordered the respondent and other respondents in that case to "*close the manmade water channel referred to as 'the furrow' together with all pipes and other relevant works installed by first respondent in terms of which water has been diverted from the Watervalstroom or the sources of the Watervalstroom to the farm Kanonkop"*. The respondent appealed the 2016 Order, and the appeal was dismissed on 11 October 2017 by a full bench of this Division.

[14] However, in July 2017, while the 2016 Order was under appeal, the respondent installed a new PVC pipe of 110 millimeters in diameter leading from the entrance of the furrow to the manhole. According to him this was in the hope that the 2016 judgment would be successfully appealed. The respondent also admits that on 11

[9] Harms *Civil Procedure in the Supreme Court*, Butterworths B6.45.

October 2017, when the appeal was dismissed, his attorney informed him to close the furrow immediately, in compliance with the 2016 Order. The respondent maintains that he did remove the upper section of portion of the pipe away from the furrow, and placed it against a bush on higher ground, and has attached photographs that he took on 13 October 2017 to support his version.

[15] The fourth applicant refutes the respondent's version, stating that he (fourth applicant) personally attended the area on 17 October 2017 and discovered that a new pipe had been positioned in the Donkerkloofstroom, and was used to convey water *via* the furrow to the manhole; and that the manhole was not closed but that water was conveyed from it *via* the pipeline to Kanonkop. On the same day, 17 October 2017 the applicants' attorney sent a letter to the respondent's attorneys recording the transgression encountered, and attached photographs depicting the new pipe leading from the furrow to the manhole. The respondent vehemently denies the applicants' version in this regard and suggests that someone must have moved the pipe from where he had left it on 11 October 2017, as well as sandbags that were placed in the entrance to the furrow.

[16] What is not in dispute is that on 23 October 2017 the Sheriff attended the location, and thereafter issued a return of service which recorded as follows: "*The manmade water channel referred to as "the furrow" with all pipes and other relevant works, installed by the first respondent in terms of which water has been diverted from Watervalstroom or the source of the Watervalstroom to the farm Kanonkop, was*

closed by the second applicant, Phillip Viljoen and his workers as per order. Photos attached". Indeed the Sheriff's return was accompanied by photographs to this effect.

[17] The evidence of the Sheriff's visit is not disputed by the respondent. The respondent also admits that some water did flow through the asbestos pipe that served as an intake into the manhole. He states however, that this water originates from a small fountain approximately 40 metres upstream from the manhole, and states that this small fountain is not relevant to any previous court applications between the parties. According to the respondent this small fountain has, for a couple of years during the winter months flowed down to join the furrow from where it flowed for about 20 meters further downstream to the manhole. I deal with the issue regarding the small fountain below.

[18] What is relevant for present purposes is that the respondent admits to installing the 110mm pipe, which was a clear contravention of the 2016 Order. In addition, what the Sheriff found on the day in question is not in dispute, namely a new pipe which had been positioned in the furrow exit and conveying water to the manhole; that the manhole had not been closed; and that the large underground pipe had not been closed. What the 2016 Order required was closure of the furrow, the manhole and pipes, and the respondent failed to comply with it. There is no doubt that the respondent acted in clear breach of the 2016 Order in October 2017.

[19] As regards the respondent's version of events - that someone else must have staged the contempt of the 2016 Order - I find it contrived and highly improbable.

Rather, the admitted facts show that it was the respondent who removed the pipe reluctantly, and thereafter left it not too far away, and in fact only moved the front end a few metres away. It is not too hard to conclude that this was to enable him to continue with unlawful abstraction of water from the Watervalstroom at will.

[20] I take note of the fact that the applicants did not immediately approach the Court for assistance to enforce the 2016 Court Order after the respondent's transgression in October 2017. However, it was to become a precursor to the events that precipitated these proceedings.

[21] In August 2020, after heavy winter rains, De Liefde had received minimal water and, upon inspection, the applicants discovered that the manhole had been opened again, and that water was again flowing from the Donkerkloofstroom *via* the furrow to the manhole, and from there *via* the 110 mm pipe to Kanonkop. This was in contrast with what the applicants had left in place with the assistance of the Sheriff in October 2017, namely the closure of the manhole by placing large rocks in it and also removing rocks, logs and branches supporting the lower embankment thereof; and removing the 110mm pipe. The applicants took drone footage of what they saw on 23 August 2020, and also addressed a letter through their attorneys dated 24 August 2020 which recorded the further contravention of the 2016 Order, and demanded closure of the furrow and all pipes and waterworks and removal of all obstructions, failing which legal action would be taken. No response was received to this letter.

[22] The respondent does not deny what was discovered by the applicants on 23 August 2020, although he denies that he personally re-opened the furrow. The respondent relies on three main contentions to refute the claim against him in this regard.

[23] First, the respondent relies on the discovery of the small fountain I have briefly mentioned earlier. According to the respondent, abstracting water from the smaller fountain via a smaller furrow does not amount to a transgression of the 2016 Order because the smaller fountain and furrow do not constitute sources from the Watervalstroom, and this water abstraction is lawful in terms of the general authorization promulgated in Government Notice 538 of 2016 (*"the General Authorization"*).

[24] In dealing with the issue of the small fountain, both parties rely on expert reports which are diametrically opposed. According to the applicants' expert, Professor du Plessis, the water emanating from the small fountain would form part of the Watervalstroom, whereas the respondent's expert, Mr Theron, states the opposite. In my view, the issue of whether or not the small fountain is separate from the Watervalstroom water, including the expert evidence upon which the parties rely on this issue, is not appropriate for resolution on the papers, and should be referred for oral evidence. There are vast and significant disputes between the parties regarding these issues which need to be tested by means of oral evidence. It is also common cause that the small fountain, although allegedly discovered by the respondent in 2016, was not raised in the litigation by the respondent as an existing lawful use, and

as a result, did not form part of the consideration by the Court. In other words, it is yet to be considered by a Court of law as an existing lawful use. In light of all these considerations, I take the view that the issue relating to the small fountain should be referred for oral hearing.

[25] Second, the respondent's response to the applicant's complaint is an interpretative argument that it was not the intention of the 2016 Order to close the big pipe flowing from the manhole to Kanonkop unless it is utilized to convey water from the furrow and/or the Watervalstroom or Donkerkloofstroom to Kanonkop. In other words, the 2016 Order does not require that the manhole and large underground pipe be closed if it is used for purposes of abstracting water from a source that does not form part of the Watervalstroom.

[26] The express terms of the Order were for the furrow to be closed, *"together with all pipes and other relevant works installed by first respondent in terms of which water has been diverted from the Watervalstroom or the sources of the Watervalstroom to the farm Kanonkop".* There is no doubt that the large pipe and manhole were included in the 2016 Order since they were the subject of the litigation. If, however, water should be discovered from a source other than the Watervalstroom, then, subject to other parties' rights to water use, my view is that it is not covered by the terms of the 2016 Order. This is because the 2016 Order proscribes respondent's installations "*in terms of which water has been diverted from the Watervalstroom or the sources of the Watervalstroom".* After all, the litigation between the parties which resulted in the 2016 Order related to abstraction of water from the Watervalstroom or

from sources thereof. If, however, such a different source should be discovered, the water must be abstracted lawfully, with due regard to other parties' rights to shared or communal water rights. It is clear that this interpretative argument is related to the respondent's contention regarding the small fountain discussed above, in that, if it is found that the small fountain does constitute a different source from the Watervalstroom, then the respondent may well have a right to abstract the water, provided that is done lawfully, without resorting to unlawful means.

[27] Third, the respondent's explanation for what was discovered on 23 August 2020 is that the furrow had been washed open by extensive flooding which took place over the previous three years. One only needs to restate what was discovered on that day in order to reject the respondent's version as being highly improbable and far-fetched. The manhole had been re-opened; water was again flowing from the Donkerkloofstroom *via* the furrow to the manhole, and from there *via* the 110 mm pipe to Kanonkop. This was in contrast with what the applicants had left in place with the assistance of the Sheriff in October 2017, namely the closure of the manhole by placing large rocks in it and removing rocks, logs and branches supporting the lower embankment thereof; packing the furrow with rocks and logs; and removing the 110mm pipe. As pointed out by the applicants, floods that were allegedly strong enough to remove the rocks from the furrow would have completely scoured the entire area, including the logs. Yet in this case, the logs inexplicably remained in place. The applicants have also placed sufficient evidence disputing the alleged flash floods. I

find the respondent's version in this regard improbable, far-fetched, and falls to be rejected.

[28] To summarise my conclusion on this section, I have rejected the respondent's claims that a flash flood caused the transgression in August 2020. I have also rejected the respondent's interpretation of the 2016 Order which suggests that any manhole and pipes installed by him for diverting water from the Watervalstroom sources were not covered by the ambit of the 2016 Order. To that extent the respondent remains under an obligation to comply with the 2016 Order, and is ordered to forthwith comply with it. However, the issue regarding the abstraction of water from a small fountain, which is alleged to be a different source from the Watervalstroom, is partly linked to the interpretative argument, and falls to be referred for oral evidence. For this reason, I do not find it appropriate at this stage to grant the contempt relief sought by the applicants in respect of the 2016 Order.

IV. CONTRAVENTION OF THE 2014 ORDER

[29] The litigation in 2014 related to a point lower downstream in the Watervalstroom from where the water had historically been divided between De Liefde, Kanonkop and Dennelaan (*"the first division point"*). The system entailed a temporary deflection wall made of stacked rocks (referred to as "klipkeerwal"), which would be constructed in the bed of the Watervalstroom to divert water to the De Liefde until the dams on De Liefde were full, after which it would be taken down to allow water to flow down to Kanonkop. The Order of 25 June 2014 was the result of

litigation between the parties regarding the deflective wall, and it granted the applicants a right to annually erect a deflection wall, which would be taken down by the respondent once the dams on De Liefde were full.

[30] In 2019, the respondent addressed a letter to the applicants complaining that a deflection that the applicants had erected in 2018 pursuant to the 2014 Court Order had become packed with sand and debris, thereby naturally making it more dense, and allowing less water to flow down to Kanonkop. However, before the applicants had responded the respondent demolished the deflection wall and erected a new one in its place. According to the applicants, the wall rebuilt by the respondent now allowed far more water to go through to Kanonkop - approximately a third of the water from the Watervalstroom. The result is that only about two thirds of the water flows towards De Liefde, which is divided at the second division point between De Liefde and Dennelaan. In effect, instead of receiving the majority of the water flowing down the Watervalstroom until De Liefde dams are full, De Liefde is now sharing that water, a substantial portion of which is already been extracted via the furrow, equally with Kanonkop and Dennelaan. According to the applicants, this means the De Liefde dams may never be full.

[31] The respondent admits to demolishing and reconstructing the deflection wall on 5 June 2019. He states that he did so because the wall was not operating as it should, and was allowing less water to flow through the wall than was envisaged by the parties. He states that he removed sandbags, debris and other plant material like roots from the wall, and repacked the wall to conform with the 2014 Court Order. The

respondent denies that he reconstructed the wall more loosely, and to benefit Kanonkop. To this effect the respondent has attached photographs, which he says support his version. Furthermore, the respondent alleges that on 25 July 2019 he found the second applicant and his workers busy repairing the deflection wall after a flash flood had occurred on the previous night. According to him, the flash flood caused a section of the deflection wall and the soil embankment immediately upstream of the deflection wall to be washed away. On this basis, the respondent alleges that it was the second applicant and his workers who caused the alleged unjust distribution of water to flow to the First Division point.

[32] In the replying affidavit the applicants have attached correspondence from the respondent dated 31 July 2019 in which it was stated that the respondent had recently reconstructed the wall. This correspondence casts serious doubt on the probabilities of respondent's version that it was the second applicant who constructed the deflection wall during that period. It would not, in any event make sense for the second applicant to construct a wall and then complain about it in these proceedings, especially in circumstances where the result is that the wall now allows approximately one third of the water flowing down the Watervalstroom to pass through to Kanonkop, instead of allowing the majority of it to first benefit De Liefde dams. The respondent's version is even more improbable given that the applicants had been constructing the wall since the granting of the 2014 Order, with no such complaints. It would make no sense for them to now build a wall that was to their detriment.

[33] Furthermore, the second applicant has produced a copy of the diary of his assistant Mr Albert Viljoen, which establishes that there was an occasion in June 2018 when he (second applicant) and Mr Viljoen repaired a broken wall, and states that the respondent could be mistakenly referring to that occasion, and not to the period under scrutiny, namely June to July 2019.

[34] Although it is vehemently disputed that the repacked wall was packed more loosely than previous walls erected by the applicants, it is not seriously disputed that the result of the repacked wall is that it allows for only about two thirds of the water to flow towards De Liefde, which is divided at the second division point between De Liefde and Dennelaan. The effect is that, instead of receiving the majority of the water flowing down the Watervalstroom until De Liefde dams are full, De Liefde is now sharing that water, a substantial portion of which is already been extracted via the furrow, equally with Kanonkop and Dennelaan. This is quite clearly contrary to the express terms of the 2014 Order.

[35] Even if the respondent's intentions were noble in reconstructing the deflection wall, in circumstances where the 2014 Court Order entitles only the applicants to reconstruct the wall, one would have expected the respondent to reconstruct such a wall only by agreement with the applicants. The fact that the respondent sent correspondence to the applicants before demolishing and reconstructing the deflection wall was not enough, because he did not await the response from the applicants. In reconstructing the deflection wall, he was required to await the input of the applicants. This is because the 2014 Order does not grant the respondent a right to construct the

deflective wall. Given the litigiousness of the issues between the parties, specifically regarding water abstraction from the Watervalstroom and the construction of the deflection wall, one would have expected the respondent to be alive to the fact that he is not entitled to unilaterally take the steps that he did.

[36] I therefore find that there was transgression of the 2014 Order by the respondent.

V. THE ALLEGED ASSAULT

[37] The second applicant claims that on 20 June 2017 he attended the area with some workers in order to conduct maintenance on the Donkerkloofstroom. The respondent arrived while the second applicant was standing on a rock, approached the second applicant and pushed him off the rock causing him to fall to the ground. The respondent then sat or kneeled on the second applicant and assaulted him with blows to his face, causing his mouth to bleed and causing bruises to his eye. The second applicant has attached a medical report showing the injuries he suffered from the incident, and which concludes that he suffered *"soft tissue injuries as a result of blunt injury due to hitting or falling"*.

[38] The respondent disputes that he was the cause of the second applicant's injuries. His version is that on the day in question the second applicant had arrived with his workforce without requesting his (respondent's) permission to visit his

property. He gained the impression that they intended to interfere with the flow of water by altering the bed or banks or course of the water. He admits that the second applicant was standing on a rock, and that he (respondent) approached the second applicant asking what he was doing there, while pointing his (respondent's) finger at him. The second applicant refused to answer, put out his hand, and slapped the respondent's finger. According to the respondent, the finger was stitched up due to an injury that he had incurred a few days prior. The respondent felt provoked, and immediately reacted by slapping the second applicant across the face causing him to fall from the rock on the ground. Thereafter, the respondent held the second applicant down with this right hand and slapped him once or twice across his face while he was lying on the ground.

[39] Even based on the common cause facts regarding the incident of 20 June 2017, the respondent admits to assaulting the applicant, although he claims that he was provoked when the applicant slapped his stitched-up finger. However, even if the respondent's justification were accepted, his conduct went beyond averting the alleged provocation to his stitched-up finger. He did not just swat the second applicant's hand away, but first slapped the second applicant across the face. Thereafter, he admits to holding the second applicant down with one hand and slapping him a few times with the other, all because he regarded the second applicant as being arrogant and provocative.

[40] What is worse is that on 24 August 2020 the respondent sent a WhatsApp message to the second applicant stating as follows: *"Lyk my dus (sic) alweer tyd vir 'n*

les in maniere want lyk my nie jou pa kon dit doen nie". This was in response to a message from the second applicant to the respondent in which it was alleged: *"Jy steel al weer"*. According to the applicants this was a reference to the previous assault of 2017, and a threat to repeat the assault if the second applicant attempted to do anything regarding the extraction of water in relation to the respondent. I agree with the applicants in this regard.

[41] As I have indicated, the common cause facts establish that the respondent did assault the second applicant in 2017. I am also of the view that the August 2020 promise to teach the second applicant manners *"al weer"* is a reference to the 2017 assault, and is a threat to assault him (the second applicant) again. In other words, that an assault is reasonably apprehended. I furthermore agree that the fact that the 2017 assault case was not prosecuted has left the second applicant with no alternative remedy but to obtain and interdict in this regard for protection.

VI. COSTS

[42] There is no reason why costs should not follow the result. I have found that the respondent has acted in blatant disregard of existing Court Orders, in circumstances where the parties have previously litigated on the issues involved in this case. In other words, the applicants have been forced to return to Court to vindicate rights already obtained in terms of previous Court Orders. Needless to say, the respondent's conduct

that is encountered in this case is also contrary to the rule of law, and exhibits repeated instances of self-help and lawlessness, which deserve censure.

VII. ORDER

[43] In the result the following order is granted:

1. The respondent is ordered to comply forthwith with the order granted by this Court on 13 December 2016 under case number 8067/2016 by closing the furrow, pipes and manhole by which water is being diverted from the Watervalstroom or sources thereof to the farm Kanonkop.

2. The question of whether the small fountain used by the respondent as from 2016 forms part of the Watervalstroom, or is from a different source, is referred for oral evidence.

3. The respondent is ordered to comply forthwith with the order granted by this Court on 25 June 2014 under Case No. 9833/14 by demolishing the stone deflection wall erected by him at the water division point located in the Watervalstroom known as the "first division point", and allowing the applicants to erect a stone deflection wall in its stead.

4. The respondent is called upon to give reasons why he should not be held in contempt of the 2014 Court Order and visited with such sanction as the Court considers appropriate. It is ordered that such proceedings be referred to oral evidence on the opposed motion roll.

5. Regarding paragraphs 2 and 4 above, in the event that the parties wish to call witnesses, witness statements signed by such perspective witnesses shall be delivered to the other party at least 14 days before the hearing.

6. The respondent is interdicted from:

    a. assaulting and/or threatening to assault the fourth applicant;

b. in any manner interfering with the applicants' right to inspect the Watervalstroom and Donkerkloofstroom water sources and taking steps to maintain same;

c. coming within 100m of the fourth applicant or any of his employees at any time.

7. The respondent is ordered to pay costs of these proceedings, on a scale between attorney and client.

N. MANGCU-LOCKWOOD

Judge of the High Court

Appearances

For Applicant	Adv D C Joubert SC
For Respondent	Adv A Newton