SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY – JUDGEMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 17 April 2019

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgement of the Supreme Court of Appeal.

STEPHANUS DE LANGE NO

v

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

The appellant, the executor in the estate of the late Petrus Willem Terblanche (the deceased) also during his lifetime farmed in the district of Koppies, appealed to the Supreme Court of Appeal against a decision of the Gauteng Division, Pretoria dismissing a claim for damages on the basis that it had prescribed.

The deceased had been a member of the Rhenoster River Government Water Scheme established in terms of s 73 of the Water Act 54 of 1956, and had enjoyed a lawful water use under that Act until it was repealed by the National Water Act 36 of 1998. That being so, under the provisions of s 32(10) of the latter Act he continued to enjoy an existing lawful water use from the scheme. He was as a result entitled to irrigate five hectares of his farm from water abstracted from the Koppies Dam which ran to his property by way of a mostly unlined irrigation canal.

During 2002, the area in which the deceased farmed was struck by drought which led the following year to water restrictions being imposed. The operation and maintenance of the irrigation canal ceased and the members of the scheme ceased paying their dues in respect of water use, such dues being used inter alia for the operation, and maintenance of the project as well as a depreciation of the capital. During 2003 the entire scheme had therefore become inoperable and was treated both by the farmers and by the authorities as non-operational. There was in any event by 2004, no water in the Koppies Dam which could be used for irrigation purposes.

The drought continued until 2005 but at no stage was the irrigation scheme resurrected. Then in February 2009, the deceased together with various other water users launched an application for a *mandamus* seeking an order that the respondent repair and maintain the canal so that water supply could be resumed. The application was settled on the basis that the scheme was discontinued and the respondent paid out the claimants' money in lieu with the deregistration of their respective water use rights. This was done by 6 October 2010. Shortly thereafter, the deceased instituted action claiming damages allegedly sustained due to the respondent having failed to supply water from 2007 to 2010. The respondent pleaded that the claim had in fact arisen in 2003 when the scheme became inoperable due to the deterioration of the canals, and that such claim had therefore prescribed. This was the argument upheld in the court *a quo*.

On appeal, the appellant argued that the deceased's claim had been to enforce a water right which was an incident of ownership and not a mere personal right, and therefore did not prescribe. The Supreme Court of Appeal, however, held that whilst the water use right held by the appellant was not a mere contractual right to abstract water, it was not an unconditional right but was dependent upon the deceased having complied with various preconditions including paying the levies. Not only had the deceased failed to pay such levies during the period to which his claim related but he never sought to abstract water during that period

either. Instead both he and the authorities treated the water scheme as a thing of the past and his water use rights as nonexistent. It was therefore irrational to accept that the deceased had become entitled to recover damages for the breach of a right to use water which he had not in any way purported to exercise.

In those circumstances, at best for the deceased, there was 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. That claim had indeed prescribed as the court *a quo* had found. The appeal was therefore dismissed with costs.