(CIV.T.1/1972)

IN THE COURT OF APPEAL FOR SWAZILAND

In the Appeal of:

ALBERT FIGUERIDO (Appellant)

versus SWAZILAND ELECTRICITY BOARD (Respondent)

Held at MBABANE

SCHRE INER,	P.	MAST SEBULA MAMBA & PARTNERS
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JUDGMENT

Delivered on the 13th day of November, 1973

MILNE, J. A.:

This is an appeal against the refusal of an application under section 54(1) of Proclamation No.10 of 1963 made to the High Court for an order condoning the delay which has taken place in the institution of proceedings by the appellant against the Respondent for damages, and of his failure to give one month's written notice of his intention to institute such proceedings, and granting him leave to institute an action for damages against the Respondent.

The Appellant is a farmer who claims that he suffered a loss of his mealie crop in consequence of the Respondent's cutting off his supply of water to his farm during February, 1969, at a time when there was a drought in the area. Water reached his farm by means of a canal several miles long which had its source below the Mkinkomo weir on the Little Usutu River. He claims that his loss was R53,750, represented by 15,000 bags of maize at R3-65 per bag. In his founding affidavit made in May, 1970, he said that when he complained to

the Respondent about the stoppage of water he was told that this was due to there being insufficient water for Respondent's power station at Edwaleni on account of the drought, and that the Respondent was authorised to do what it did under a permit. He went on to say that after he had taken advice of his attorney, Mr. Carlston, the latter interviewed Mr. Thompson, the Secretary to the Respondent's Board and thereafter wrote him on 16th July, 1969, in the following terms:

"We refer to the writer's discussion with your Mr. Thompson regarding our client and his complaint about loss of crops due to deprivation of water upon which he relied.

Our client is the owner of property situate below the weir on the Edwaleni Power Scheme, entitled to participate in both the overflow and what is known as the compensation waters of not less than 5 cusecs.

During January/February, 1969, all of such waters were cut off without any notice to our client. Complaints were laid, and investigations were made by various persons, who confirm that this deprivation of water has caused the virtually complete failure of our client's crop - his loss of 15,000 bags of maize.

Mr. Thompson's attitude during our conversation was to the effect that his Board had heard of this matter, but was not responsible for our client's calamity. The information given to us is that the water was cut off out of necessity to supply the needs of someone ex the Great Usuthu and still provide the reeds of your Board, and, further, that his cutoff did indeed occur at the instance of your Board or through the fault of its servants.

We communicated to our client Mr. Thompson's indication that the fault does probably not rest with your Board, but he insists that we take the matter further on his behalf.

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Our client's loss appears to be considerable. Under the circumstances we must request that immediate discussion on the matter takes place between the Board and our client, and we shall be pleased to know whether you are disposed to this or not.

Your urgent reply is requested."

The Appellant went on to say that on the invitation of Mr. Thompson, Mr. Carlston and he had a meeting with him on 5th August, 1969, and that following upon the meeting, a letter was addressed to Mr. Thompson the next day, reading thus:

"We confirm the visit of the writer and our client, Mr. Figuerido, to your office yesterday and are grateful for the interview granted by Mr. Thompson and Mr. Densham.

It emerged from that meeting that the liability of the Board to users below the Mkinkomo Weir should be determined and if such liability is determined how your Board can assist Mr. Figuerido. In this connection, we were shown a copy of the Permit dated the 8th October, 1964 issued to you under Section No.19(1) of the Proclamation from which it appears that your Board is entitled to the diversion of 400 cusecs from the Great Usuthu through the canal to Edwaleni.

We are investigating what obligations your Board has as a result of such permit and the Law and would confirm our advice that our letter dated the 16th July, 1969 was addressed to you as a precaution once it became apparent that some delictual liability might attach to your Board in respect of the waters which Figuerido states were deprived him at a crucial time.

We will be communicating with you again as soon as possible." The permit in question (Annexure "C") reads as follows:

"The SWAZILAND ELECTRICITY BOARD is hereby

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authorised -

(a) to store water in the reservoir upstream Mkinkomo weir on the little Usuthu River in the amount of approximately 3,000 acre feet;

(b) to divert from the said reservoir a maximum amount of 400 cusecs through a canal leading to the Edwaleni Hydro-Electric Power Station; and

(c) to build a diversion weir at Mhlambasoka on the Greater Usuthu River, and to divert a maximum

amount of 200 cusecs through a canal leading to the Edwaleni Hydro-Electric Power Station.

2. This permit is issued subject to the provisions of the Electricity Proclamation, 1962, and upon condition that the water permitted to be diverted under paragraphs (b) and (c) is to be returned to the Greater Usuthu River at a point near the power station.

3. This permit may be cancelled and replaced by another permit, or the conditions varied, at any time, by me."

The Appellant further stated that the matter was pursued "through the Ministry of Agriculture" and that a discussion eventually took place with the Chairman of the Water Apportionment Board, Mr, Sherrin, after which Cape Town Senior Counsel's opinion obtained dated 13th October, 1969 which resulted in a demand being sent to the Board on 20th October, 1969, reading thus;

"We confirm the writer's discussion with Mr. Thompson and particularly our letters of the 16th July and 6th August, 1969, which set out the likelihood that our client would determine that
he has an action for damages against your Board

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by reason of his water supply having been closed by your Board, without warning or advice, so that our client was unable to take any measures to save his maize crop early this year.

Your Board purported to act in terms of a Permit granted to it under Section 19(1) of the Electricity Proclamation by Her Majesty's Commissioner in 1964.

This serves to notify you that Application is being made to Court for a declaratory Order that such Permit is ultra vires and of no effect and that our client's rights to water in the Little Usuthu are preferent to those of your Board.

We have further to give you notice that our client demands payment of compensation to him for the loss of his crop through the wrongful or negligent act of your Board or its servants. The quantum of our client's claim is R53,750-00 through a loss of 15,000 bags of Maize valued at R3.65 per bag.

Unless your Board acknowledges its liability to our client in that amount or an amount to be negotiated by not later than Thursday, 20th November, 1969, action will be taken against it in terms of the Proclamation." Paragraphs 13-17 of the affidavit are as follows:

13. This resulted in Mr. Carlston being written to by Mr. R.D. Friedlander, Attorney to the Swaziland Electricity Board, and he enquired into the reasons for my contention that the Board had acted illegally. These details were furnished.

14. On the 2nd December, 1969, Mr. Friedlander wrote advising that "As at present advised the Board disputes liability and it is for your client to decide whether he wishes to proceed with an action," On the 29th January, 1970, Mr. Fiedlander was advised that I intended so proceeding.

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15. Thereupon Advocate J. Kriegler of Johannesburg was instructed to prepare the Plaintiff's Declaration and when returning the draft he drew attention to a matter overlooked by Counsel in Cape Town. Counsel in Cape Town was again briefed on that point as also the correct forum for the intended proceedings.

16. The above are the circumstances leading to the delay in instituting the threatened proceedings coupled with the fact that these proceedings cannot be instituted without leave of the above Honourable Court.

Furthermore I have been improverished by the loss of my crops as aforesaid and required to be satisfied as to the probabilities of success before venturing into litigation and be in a position to adequately instruct my Attorneys to proceed.

17. In the circumstances averred to and particularly as -

(a) Respondent is not prejudiced by the delay in the action being instituted now;

(b) the delay is not attributable to neglect or disregard for the rights of Respondent :

(c) that the limiting period should for all intent and purposes (sic) be deemed to run from the time at which I became aware that if responsibility for my loss is attributable to anyone it is Respondent, that is in July 1969, and

(d) my claim is one of a considerable amount, I respectfully submit that it is proper that I be granted leave to institute my action against Respondent at this stage.

Accordingly, I humbly pray that it may please the Honourable Court to grant an Order -

(i) Condoning any delay as may have taken place in the institution of proceedings by me against the Swaziland Electricity Board for damages,

(ii) Requiring me to institute such proceedings within such time as to the Honourable Court seem meet,

(iii) Ordering that the costs of this Application be costs in the cause.

(iv) For further or alternative relief."

The application was set down to be heard on 15th July, 1970, but was then, by consent, postponed sine die. It was re-instated on the roll in terms of a notice dated 30th September, 1971, which was accompanied by a supplementary affidavit from the Appellant, in the course of which he stated that in the interim there had been negotiations between the parties for a settlement, that it was not until June, 1969, after he had finished reaping, that he was in a position to fix the true amount of his claim without which he was advised that he could not formulate it or institute action. He also said that in April, 1969, he had interviewed Mr. Kirsh, the Chairman of Respondent's Board about his complaints who, he said, had told him after telephoning the Board's attorney, that the Board "would be liable" for any loss that he had suffered, that it would not be necessary for him to institute proceedings, that he should inform his attorney accordingly and ask him to write setting out his claim, that he had done this but that his new attorney, Mr. Scott-Smith had been unable to find any corresponding letter in the file handed to him by Mr. Carlston at the time when he terminated the latter's mandate. The Appellant stated that he assumed that this was because a claim could not be formulated until the loss had been assessed.

In this supplementary affidavit the Appellant stated that at the August meeting with Mr. Thompson the latter had said that if liability of the Respondent to users below were determined he would be paid compensation, that in consequence of this he had consulted the Ministry of Agriculture and the

Chairman of the Water Apportionment Board. He annexed a letter written by Mr. Carlston to the Respondent's attorney on 28th October, 1969, reading thus:

"We confirm the writer's discussion with Mr. Friedlander on the reasons for our contending that the Permit

granted to the Board, dated the 8th October, 1964, is "ultra vires".

Our client is a "prior dated user" in a Special River Control Area and in terms of Section 20 is entitled to abstract water which he was lawfully using at the date when the area was proclaimed a Special River Control Area.

As the Commissioner was compelled by law to recognise the "prior dated user" he would frustrate the protection afforded to such user if he should issue Permits for additional use so that water is taken from the "prior dated user".

On the facts of our client's position as a user, we are advised that his rights are preferent to that of the Electricity Board, The Board has no right to divert water to his prejudice.

We may say that in advising our client, consideration has been given to Section 20 but the Permit issued by Her Majesty's Commissioner was not issued in terms of that Section but rather in terms of Section 19(1).

The question of the Permit being "ultra vires" is only one aspect of the matter for we consider that our client's claim is also supported by your client's having acted unreasonably in cutting off his water supply as they did.

We furnish this information to you simply to expedite matters and we, of course would be happly to iscuss our client's attitude with you at any time."

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He also annexed a copy of a letter addressed by Mr. Carlston to the Respondent on 10th February, 1970, reading as follows:

"As indicated to Mr. Friedlander, we are almost ready to commence proceedings against the Board for damages sustained by Mr. A.S. Figuerido referred to in our previous correspondence to you.

According to Mr. Figuerido, it might be possible to have a discussion aimed at avoiding the proceedings and accordingly we attach a draft of the Plaintiff's declaration which will be served upon you shortly and as soon as we receive advice from Counsel as to the correct forum of the proceedings.

We shall be grateful to know whether any useful purpose will be served by a discussion at this stage." This letter was written, he said, because Mr, Thompson had indicated to him earlier in the month that the matter was still open for negotiation and that the Respondent might consider settling a part of his claim. He added that at no time had it been suggested by the Respondent that it would invoke the provisions of Section 54(1) of the Electricity Proclamation (No.10 of 1963) which reads thus:

"(1) Any person desiring to take action against the Board for damages arising ex delicto shall notify the Board in writing of his intention to do so within one month of his becoming aware of the event giving rise to such damage, and the proposed action shall be instituted within one year from the giving of such notice. If notice is not given within the time stipulated or if the action be not commenced within one year from the giving of such notice then such action shall be prescribed and may not be instituted except by leave of the High Court on good cause shown."

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In opposing the application affidavits from Mr. Thompson and Mr. Kirsh were filed as well as ones from Mr. Richardson, Chief Executive Officer of the Respondent and Mr. King, a Mechanical Engineer employed by the Respondent. Mr. King, on the Respondent's instruction, carried out a survey in August, 1970, in consequence of which he came to the conclusion that, regardless of the quantity of water entering the canal at the river point, not more than half a cusec would arrive at the Appellant's farm and

that no more than 35 acres of the Appellant's 700 acre farm could be irrigated by that quantity of water. He also ascertained, he said that about 350 acres of the farm were above the canal and could, in any event, not be irrigated with water from it without pumping and irrigation equipment,

Mr. Thompson in his affidavit, sworn on 10th February, 1972, said that to the best of his recollection the first intimation he had of the Appellant's claim was a telephone conversation with Mr. Carlston shortly before he received the letter of 16th July, 1969 (and that there was no interview between him and Mr. Carlston prior to that letter being written) though he might have heard of the claim a few weeks earlier from a Mr. Brook of the Water Affairs Department. He said that there was "no doubt" that neither he "nor any other person in authority at the Board" was notified of this claim earlier than the middle of June. Mr. Kirsh, however, was unable to say that the discussion which he had with the Appellant did not take place in April, 1969, but he went on to say that he told the Appellant that he had no executive capacity on the Board and that he should contact either the Chief Executive Officer or the Secretary of the Board about his complaint. He denied that he telephoned his attorneys or admitted any liability on the part of the Board or said that it was unnecessary for the Appellant to institute proceedings. I should add that Mr. Thompson in his affidavit stated that what he had said to the Appellant and his attorney at the meeting on 5th August, 1969, was that the Board was concerned to ascertain its legal position in relation to users below

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the weir and that if the Respondent was satisfied that it was legally liable for any loss which the Appellant had sustained "the Board would no doubt approach the matter sympathetically". He denied that the Appellant was told "in February, 1970, or at any other time" that the matter was still open for negotiation and added that at the meeting in question the Appellant had unsuccessfully tried to prevail upon Mr. Richardson to accept liability at least for the cost of the fertiliser.

Mr. Richardson in his affidavit whilst admitting that the flow of water below the weir was cut off from 31st January to 27th February, 1969, maintained that this could not "be related to any loss sustained" by the Appellant as a result of the failure of his crop. He said that the Respondent had no record of any claim by the Appellant until July, 1969, and that it was then that the Board advised the Appellant that, because of the drought, it had utilised all the water at the weir "as it was entitled to do in terms of its permit". He said that he had been informed that the Appellant had made representations to the Water Board and to the Ministry of Agriculture at the end of March, 1969. Mr. Richardson claims in his affidavit that the Respondent was prejudiced by not being earliest notified because if it had been notified "the whole matter could immediately have been investigated and the Board would have sent its experts to conduct an inspection". He said that by July, 1969, there was "no evidence of what the crop might or might not have been and the Respondent was unable to do anything to remedy the position". He went on to say that although meetings and discussions had taken place from time to time, the Respondent had never indicated that it would be prepared to settle the claim and he supported Mr. Thompson's denial that Mr. Thompson had said in February, 1970, that the matter was still open for discussion.

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In a replying affidavit the Appellant said, inter alia, that the person to whom he made oral complaint in February, 1969 was an official of the Respondent whose name he believed to be Langley, that this person had accompanied him on an inspection of the weir and canal and had thereafter transmitted a radio message to the office of the Respondent reporting that no water was being allowed to pass trhough the canal.

Mr. Richardson in reply says that although he had asked Appellant whenever he saw him who it was to whom he had reported, the complainant was unable to give his name. He went on to say that Appellant had described the man as having fair hair whereas Mr. Langley, who was a technician employed by the Respondent at the time, had jet-black hair.

Pike, C.J., who heard the application, ruled that the Appellant must be regarded as having been lawfully abstracting water within the meaning of section 20 (1)(b) of Proclamation No. 10 of 1963, at least until

1967 when section 18 to 25 were repealed by the Water Act No. 25 of 1967 and it was common cause before us that as a "prior dated user" the Appellant was, before the 1967 Water Act came into force, lawfully abstracting water in terms of section 20 (4) of the Proclamation, that he was entitled to a permit in terms of section 20 (3). Pike, CJ., came to the conclusion, too, that despite the repeal of section 20 of the Proclamation, if the Appellant was lawfully abstracting water within the meaning of section 69 (2) (a) of Act 25 of 1967, he was entitled to continue doing so, and that the Appellant accordingly had an arguable claim that he had a right to abstract water. He held, however, that the Respondent had not been shown to be acting outside the terms of its permit in doing what it had, and that, as the Appellant had not shown that his rights were preferent to those of the Respondent, he had no valid cause of action for damages against the Respondent. Obviously, if this conclusion is correct, the Appellant's application could not succeed and that was, indeed, inevitably

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common cause. The learned Chief Justice went on to hold that the Appellant had, in any event, failed to show "good cause" for the grant of leave to institute the proposed claim. I quote the following extract from his judgments.

"The requirement to give notice within a month can hardly be said to be unduly burdensome. It seems to me to require the applicant to do only what any reasonably prudent person would do without being required.

The application says that after his supply of water ceased as a result of the action of the respondent the applicant complained in February to a person he believes is one Langley, an employee of the Respondent. That it was a Mr, Langley to whom he is alleged to have made his complaint was not revealed until March 1972 in the applicant's replying affidavit. Prior to this the applicant alleged in paragraph 4 of his first affidavit of May 1970 that he informed the Board. Complaining to an employee of unspecified status and uncertain identity in the Respondent's Board's organisation is a very different thing to informing the Board - Mr, Langley may have been a very lowly employee for all the Court knows. He says Langley inspected the weir and canal with him and sent a radio message to the Board reporting that no water was passing through the canal. There is no evidence that this message reached anyone, let alone in authority in the Respondent Board. It is surely not unreasonable to expect that if this occured, immediately thereafter the applicant would have written to the Board confirming Mr. Langley's inspection and action.

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While it may be that his attorney may have been dilatory and negligent in the conduct of the applicant's affairs after he was consulted, it appears equally

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clear that the applicant himself failed to do what any reasonably prudent man who considered he had suffered damage as a result of the respondent's act would have done. namely, to put in writing to the respondent his complaint.

It is clear from the terms of section 54 that the important requirement of that section is the giving of notice within a month of becoming aware of the event giving rise to the damage. If notice is given timeously but the action is not brought within the year thereafter, the possibility of prejudice to the respondent would be far less since it would be his own fault if he did not take the necessary steps to investigate the claim.

The respondent says that to allow action to be brought now would be prejudicial since the respondent is not now in a position to refute evidence as to the physical state of the canal three years ago, nor can it investigate the applicant's claim either as to the cause or extent of the damage to his maize crop." His judgment concluded as follows:

"Even on a liberal view of the facts of this case it seems to the Court that the Applicant as well as his attorney have been negligent in failing to take the ordinary prodent steps which should have been taken. Having regard to the Applicant's own laxity in failing to make any commplaint in writing to the Board timeously, to his dilatoriness in making this application, to the prejudice which it seems to this Court the Respondent would suffer in defending such an action at this late stage and to the lack of merits of the Applicant's claim against the Respondent, the application is refused."

The Appellant appeals on a number of grounds which claim, inter alia, that he had put forward an arguable case that the Respondent's rights to water were not preferent to his, that

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the Court a quo erred in making adverse findings of fact without hearing evidence, and in ho ding that the Appe-11 ant was obliged "but had failed to take ordinarily prudent steps, and that the taking of prudent steps was a prere- quisite to the grant of leave to institute the proposed action for damages.

I propose to deal first with the question whether the Appellant can. be said to have a valid right of action for damages against the Respondent; i.e.,to assume, because the answer to a basic legal question is involved, that it-must be decided in,his favour before he can be granted the relief which he seeks in these proceedings.

Part III of the Electricity Proclamation,,No.l0. of 1963, embracing sections 18 and 25, inclusive, was headed "WATER RIGHTS", and its intention was clearly to make provision for the operation under the Respondent of hydro-electrie under takings based on the flow of water in public streams for the generation of electric power, whilst continuing, subject to the provisions of the chapter, the right to abstract water of those persons who, like the Appellant, were lawfully abstracting water prior to the proclamation of any relative area as a Special River Control Area (now deemed to be a Government Water Control Area by virtue of section 66(30 of the Water Act, No. 25 of 1967). Section 19(1) of the Proclamation provided that "no person shall, except under the. authority of a permit from the Resident Commissioner and on such condition" as might be specified in such permit, (inter alia) "abstract, impound, store or use such water," but this was subject to what was provided in section 20(2) and (3) and, in so many words, section 20(4). Subsections (2) and (3) of section 19 were in the following terms:

"(2) A permit under subsection (1) may provide for the abstraction during any period of a specified quantity of water within the area in question and

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for the impounding, storage and use thereof by any person for any purpose at any place within such area and the conditions specified in such permit may include any provisions which the Resident Commissioner may consider necessary and different conditions may be specified in respect of different periods in any year or in respect of different persons or classes of persons.

(3) The Resident Commissioner may in any such permit provide for the temporary increase or reduction of the quantity of water which may during any period be abstracted by any person if special circumstances warrant or require it, and may at any time amend the conditions specified in any such permit."

Subsection (5) provided for the keeping of a full register of all permits used, recording, inter alia, the quantity of water which any person was entitled to abstract in terms of any permit. Section 20, which is headed "Existing Rights", provided in subsection (2) that prior dated users must "within three months after being called upon to do so by the Resident Commissioner by notice in writing, communicate to the latter" certain particulars, particulars which were manifestly required for the issue of appropriate permits and the proper keeping of the register, "prior dated user" being defined in subsection (l)(b) as "a person who at or prior to the date on which any area is declared a Special River Control Area is or was lawfully abstracting, impounding or storing any water from a public stream within that area." The subsection went on to provide

that such particulars, as well as the quantity of water which such prior dated user was entitled to abstract, must be recorded in the register.

Subsection (3), (4) and (5) of section 20 read thus: "(3) Any prior dated user shall be entitled to a

permit to be issued by the Resident Commissioner in terms of section nineteen on such conditions as he may deem fit to impose; to enable him to continue to abstract, impound or store the quantity of water that he was lawfully abstracting, or impounding and storing at the date of publication of the declaration of the Special River Control Areas:

Provided, however, that on written application made to him by the Board, the Resident Commissioner may exercise the powers granted to him under subsection (3) of section nineteen and reduce for a temporary period or periods the quantity of water granted in such permit by notice addressed to the holder thereof specifying the amount of such reduction and the period during which such reduction shall be made. (4) Notwithstanding the provisions of subsection (l) of section nineteen any prior dated user may continue to abstract, impound or store the quantity of water which he was lawfully abstracting, impounding or storing from a public stream in the Special River Control Area unless he fails to comply after expiry of the said three months to the Resident Commissioner's satisfaction, with the notice issued to him in terms of subsection (2):

Provided, however, that after the issue of a permit to him such person shall not abstract, impound or store water otherwise than in accordance with the conditions specified in such permit.

(5) Notwithstanding any of the provisions to the contrary in the Water Proclamation, 1959, or in any other law contained, and notwithstanding that no permission has been granted by a Water Court, the Board shall for the purposes of operating or maintaining a hydroelectric undertaking owned or operated by it and sited at or near a public stream falling within a Special

River Control Area, be entitled to a permit from the Resident Commissioner to abstract, impound, store or divert such of the water thereof as it may require for such purposes upon such conditions as the Resident Commissioner may deem fit to imposes:

Provided that the Board shall after abstracting any such water return it to the stream from which it was so abstracted or to such other stream as the Resident Commissioner may approve (with no other loss than that which has been occasioned by such use) at such other point as may be convenient."

Section 21 gave the Resident Commissioner power to cancel a permit if in his opinion water was not being beneficially used under a permit, and section 22 provided that permits attach to the land, and that they be available to any successor in title or assign of the person to whom it was issued. (The Provisions of section 22 are repeated in section 69(9) of the Water Act of 1967).

Section 24 provided for compensation to be paid to the Respondent whenever the Resident Commissioner by notice reduced the quantity, during any period, of water abstracted, etc., by any prior dated user holding a permit, and that such compensation should not be paid to any person "not entitled to a permit in terms of subsection (3) of section twenty", by reason of any restriction placed upon him under the Proclamation in connection with the use of water.

Although sections 18 and 25 were repealed by the Water Act of 1967, the latter Act enacted in their place certain generally similar, and some new, provisions, contained in the numerous subsections of section 69, and the provisions of section 70. Some provisions of section 69 were amended by Act No. 40 of 1970, and the amendments were, by the latter Act, "deemed to have come into force on the first day of March, 1968". The setting out, below, of certain parts of section 69 is in their form as amended by the 1970 Act.

Subsections (1) and (2) of section 69 read as follows omitting, however, the nine subparagraphs of subsection (2) indicating the nature of the particulars which may be called for, of which, when they are supplied, the Director was required to keep a register.

69 "(1) Notwithstanding anything to the contrary contained in this Act but subject to the provisions of subsection (4), the rights to the use and the control of water in any public stream in a Government water control area shall vest in the Minister on behalf of the Government and shall be exercised by the Board, and no person shall, except as provided in subsection (2), or under the authority of a permit from the Board and on such conditions as may be specified in that permit -

(a) abstract, impound, store or use such water; or

(b) construct, alter or enlarge any waterwork for the abstraction, impounding, or storage of such water,

unless the Board has by notice published in the Gazette authorised the abstraction, impounding, storage or use of such water or the construction of such works or otherwise than in accordance with the conditions specified in such notice.

(2) (a) Any person who, within a prescribed period prior to the date upon which any area is declared to be a Government water control area under subsection (1) of section sixty-six was abstracting, impounding or storing any water from any public stream within that area by means of waterworks in existence on the said date shall, within three months after being called upon in writing by the Minister to do so, communicate to the latter particulars showing - "

Subparagraph (b) of section 69(2) reads:

"(b) Any person referred to in paragraph (a) who

is beneficially using the water abstracted, impounded or stored, shall be entitled to a permit to be issued by the Board on such conditions as it may deem fit to impose, to enable him to continue to abstract, impound or store, and se, for such purposes as may be prescribed in such permit, a quantity of water at the rate at which he was lawfully, beneficially and efficiently abstracting or impounding and storing water during the aforementioned period."

Paragraph (e) of subsection (2) reads thus:

"(e) No person shall abstract, impound or store water from a public stream referred to in paragraph (a) without having furnished the particulars mentioned in that paragraph as required by the Minister or, if a permit referred to in paragraph (b) or (c) has been issued, otherwise that in accordance with the conditions specified in that permit."

Section 69(3) (a) and (b) read thus:

"3(a) A permit or notice issued under this section may provide for the abstraction, during any period, of a specified quantity of water within the area in question and for the impounding, storage and use thereof by any person for any purpose at any place within such area and the conditions specified in such permit or notice may relate to the nature of any works which may ha constructed or the size or capacity of any such works and may include any other provisions which the Board may consider necessary to promote the more efficient and beneficial utilization of the water resources of the said area, and different conditions may be specified in respect of different periods in any year or in respect of different persons or classes of

person.

(b) The Board may in any such permit or notice provide for the temporary increase or reduction of the

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quantity of water which may during any period be abstracted by any person, if, in the opinion of the Board, special circumstances warrant or require it, and may at any time amend the conditions specified in any such permit or notice."

(It may be observed , in passing, that section 69 does not appear to provide for any "notice" to which subsection 3(a) and (b) could apply, except the notice in the Gazette referred to in section 69(1).

Subsection (4)(a) of section 69 provides what must be done after the Board has determined the total quantity of water in respect of which under subsection (2) or subsection (4)(c), permits are to be issued, including the determining of the total quantity of water to be made available under subsection (l) for use by proprietors of riparian land within the Government water control area, and determining the formula according to which such quantity of water is to be apportioned between such riparian owners, and subsection (4)(b) provides that "the formula so determined shall provide that the apportionment insofar as it relates to persons to whom permits have been or are to be issued under paragraphs (b) and (c) of subsection (2), shall, subject to this provision of paragraph (c) of this subsection, be made with due regard to the respective quantities of water in respect of which permits have been or are to be issued to such persons under paragraphs (b) and (c) of subsection (2)".

(It was evidently here overlooked when the 1970 amendments were made that paragraphs (b) and (c) of subsection (2) became a new subparagraph (b), only.)

Section 69(4)(c) provides as follows:-

"(c) In determining the formula to be applied in respect of any person entitled to a permit in terms of subsection (2), the Board shall have regard to the nature of the undertaking in connexion with which

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water is being used, and if, in the opinion of the Board it is in the public interest to do so, the determination made in respect of such person shall provide for an apportionment to that person of a quantity of water which, together with the quantity of water which may be allocated to him under that subsection, shall, in the opinion of the Board, be sufficient to enable such person to efficiently and economically irrigate the extent of land as determined by the Board, which has been or is to be irrigated annually by means of the works referred to in sub-paragraph (ii) of paragraph (a) of subsection (2) or otherwise to efficiently and economically carry on the said undertaking."

Section 69(2)(a)(ii) reads, "the nature and size of the waterworks" and"waterwork" is defined in section 2 to include, inter alia, any canal or channel used in connection with, inter alia, the abstraction of water.

It is common cause that no particulars have ever been c ailed for, either by the Resident Commissioner under section 20(2) of the 1963 Proclamation or under section 69(2) of the Water Act of 1967 by the Minister. The effect of that, it is contended by the Appellant, is that neither subsection (1) nor subsection (2)(e) of section 69 operates to prohibit the Appellant from abstracting water to the same extent as he was entitled to abstract water prior to the repeal of Chapter III of the 1963 Proclamation, save that the Water Allocation Board (to which I shall refer as the Board) on the written application of the Respondent, is empowered to reduce the quantity of water to which a person is stated, in a permit issued to him, to be entitled. In dealing with this aspect of the case, Pike, C.J., said:

"Counsel for the respondent argued that sub-section (2) (e) made it clear that unless the applicant had a

permit would have no right to abstract water. This does not appear to me to be proper interpretation of this subsection because the applicant was under no obligation to furnish particulars until he was called upon to do so, and until that happened it seems to me that if he was lawfully abstracting water within the prescribed period he was entitled to continue to do so. Section 69(2)(a) is not limited to a permit holder. The words used are "any person who was abstracting" etc., and paragraph (2)(vii) of the particulars which can be called for requires the person concerned to show whether he was abstracting water in accordance with any order, award, decision, permission, etc., "or otherwise". These last words seem to me to make it clear that the section did not intend to limit its application only to persons acting under a permit or other similar authority."

This, with respect, appears to be a correct exposition of the matter, which is further expounded later in this judgment.

It will be convenient here to refer to some of the provisions of section 4 of the Water Act of 1967 (to which I shall refer as the 1967 Act) reading thus:

"The provisions of this Act, except section sixty-nine, shall not be construed as

(a) affecting or derogating from -

(i) any right to water which at the commencement of this Act has been lawfully acquired in terms of any award, order, decision, permission, authority or apportionment given or made by a Board of Adjustment, Water Court or by the then Resident Commissioner under any law in force prior to

the commencement of this Act, or otherwise, and which is possessed and is being beneficially exercised;

.....

(b)(ii) preventing any person, who, prior to the said date of commencement, used and was entitled to use the water of any stream for agricultural purposes on non-riparian land, from continuing so to use such water.

Section 70 (headed "Special Provisions relating to Little Usutu and Great Usutu Rivers special river control area") provides in subsection (2) that, subject to subsections (3), (4) and (5), a permit issued under section 19 of the 1963 Proclamation, "shall be deemed to have been issued under section sixty nine of this Act"'.

Subsections (3), (4) and (5) of section 70 are as follows:

"(3) If, upon the application in writing of the Electricity Board, the Board, in terms of a condition imposed by it under paragraph (b) of subsection (3) of section sixty-nine in any permit issued in relation to any public stream in the special area, reduces for any period the quantity of water which may be abstracted, impounded or stored by any person under such permit, the Board shall send to the person concerned a notice by registered post setting forth the period during which such reduction shall be made and the nature of the reduction and shall, in such notice, direct such person to take such steps as may be specified to give effect to such reduction.

(4) The Electricity Board shall pay to any person, referred to in subsection (3) to whom a permit has been issued under paragraph (b) of subsection (2) of section sixty-nine, such compensation arising out of the said

reduction as may be agreed upon, or failing agreement, as may be determined by a Water Court on the application of either of the parties.

(5) The Electricity Board shall not be obliged to pay compensation arising out of any reduction imposed under subsection (3) in respect of a permit relating to any public stream in the special area and issued to any person who is not entitled to a permit under paragraph (b) of subsection (2) of section sixty-nines:

Provided that after a period of twenty years has elapsed, calculated from the nineteenth day of May, 1964, the provisions of subsection (4) shall apply in respect of such person."

(The 19th of May, 1964, was the date on which the area in question in this case was declared a special river control axes.)

As regards the question whether the Appellant can be said to have a valid right of action in respect of the proposed claim for damages it was claimed by Mr. Wentzel for the Appellant that there was no intention on the part of the Legislature in the 1967 Act to take away the rights of any person who was lawfully abstracting water at the time of its coming into operation whatever elaboration there was of the extensions or limitations placed upon their exercise, and his submissions included the following:

(a) that the Appellant was, as a prior dated user within the meaning of section 20(2) of the 1963 Proclamation,lawfully abstracting water before the Respondent obtained its permit on 8th October, 1964, and that his rights, as such, were not lessened by the issue of that permit;

(b) that, accordingly, whatever rights were conferred upon the Respondent by the permit, they did not

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authorise it to do anything amounting to interference with the Appellant's own rights, which were specifically preserved by section 20(4) of the 1963 Proclamation, inasmuch as not having been called upon by the Resident Commissioner to comply with any notice under section 20(2) of the Proclamation, he had not failed so to comply, and his rights were, accordingly, unconditionally preserved;

(c) that by reason of the provisions of section 4 of the Water Act of 1967 nothing in that Act, other than section 69, is to be construed as derogating from the Appellant's said rights, and that no provision of section 69 operates or operated to derogate from such rights;

(d) that the remedy of the Respondent, if it wished to avoid an action for damages of the kind contemplated, was to induce the Minister to call for the particulars referred to in section 69(2)(a) who would, pursuant to their receipt, in due course issue a permit to the Appellant who would then, as such, be entitled in terms of section 70(4) to compensate for any reduction in favour of the Respondent of the water allocated to him thereby, which was authorised by the Board under section 70(3).

Mr, Kuny for the Respondent submitted on the question whether or not the Appellant has an arguable right of actions

(1) that section 20(5) of the 1963 Proclamation operated to give the Respondent a right to a permit entitling it to abstract, impound, store or divert all the water that it might require for its purposes,

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that it was not alleged that its permit gave it authority to impound, store and use more water than it required for its purposes, that it was not allowed that it used, during the critical period between 31st January and 27th February, 1969, any more water than it was entitled to use under its permit, and that its rights under its permit were not derogated from by anything in the 1967 Act in view of the provisions of

section 4(a) (1) of that Act, since there was nothing in section 69 which derogated from such rights;

(2) In effect, that section 69(2)(e) of the 1967 Act operates in derogation of any rights of the Appellant which had been preserved by section 20 (4) of the 1963 Proclamation, as the Appellant neither has a permit nor has furnished the particulars referred to in section 69(2)(a);

(3) that, as regards compensation, the Appellant was entitled to apply for and be granted a permit under section 20(3) of the 1963 Proclamation and under section 69(2)(c) of the 1967 Act before its amendment in 1970 (section 69(2)(b) after its amendment) without first being called upon to furnish particulars; furthermore, that the provisions for compensation, in both Statutes, applied only to upper users; furthermore, that under section 70 of the 1967 Act compensation is payable by the Respondent only if it makes written application to the Board to reduce for any period, in terms of a condition imposed on a permit issued by the Board under section 69(3)(d), the quantity of water abstracted, impounded or stored under such permit.

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It is convenient to deal first with these propositions relating to compensation, taking the last of them first, and bearing in mind that the provisions as to compensation are relevant only as an aid to interpreting other provisions of the statute in relation to the question whether or not the Appellant has a right of action for damages. I entirely agree with the Respondent's contention, that a written application by the Respondent, to the Board under section 70(3), (as it was under section 24 of the Proclamation) is a condition precedent to the obligation to pay "compensation" as such, by the Respondent, just as it is a condition precedent to its lawfully reducing the quantity of water to which a prior dated user is declared to be entitled. It is of importance to realise that the Allocation Board may reduce anyone's quota without any prior notice to him, and that the compensation, if not agreed upon, can later be determined by the Water Court. The Respondent could without any authority from the Board and, correspondingly, without liability to pay the statutory compensation, reduce the quantity of water to which another is entitled, not least to any permit holder so entitled, simply by taking all the water it requires without making any application to the Board. As regards upper users it could do this, physically, simply by partially blocking the entry of water from the river to an upper user's channel or pipe. But, if the Respondent, without the authority of the Board, reduces the quantity of water to which any prior dated users are declared to be entitled, it will simply infringe their entrenched rights, and thus give rise to an action for damages

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suffered by them in consequence of the reductions a fortiori if it cuts off the water altogether instead of merely reducing it, which latter is all that the statute conditionally permits.

In my view, on a proper construction of the legislation, the Appellant's rights as a prior dated user without a permit (a) have not been taken away by anything in section 69 of the 1967 Act and have thus been preserved by section 4, and (b) they were and are subservient to those of the Respondent only to the extent that the latter is entitled to apply for a reduction in the quantity of water which the Appellant was declared to be lawfully entitled to abstract in terms of section 20(4) of the 1963 Proclamation, and that he has valid cause of action against the Respondent: the legislature having been demonstrably at pains when it created the Respondent and since that time, as far as possible to safeguard economically all persons who were lawfully abstracting water from the river prior to the declaration of the area (which includes the appellant's farm) as a river control area. I have already pointed out that it was common cause that the Appellant is a prior dated user who, as such, is entitled to a permit and there exists no basis for the suggestion by Mr. Kuny that compensation is to be paid under section 70 of the Act only to upper users. The rights of the Respondent are statutory, and wholly tertiary, since all their water must be returned to the Greater Usutu River, whilst those of all prior dated users have been statutorily entrenched, no distinction whatever being made between upper and lower users. If, before the envisaged permit system has been duly introduced, the Board reduces (or wholly cuts off)

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water which, but for its action, will flow to the lands of any person declared to be entitled to an ascertainable quantum, it simply commits a delict against that person, and it may well be that that is why the prescriptive provisions of section 54 as regards claims for damages against the Respondent, based on delict, were introduced.

The Respondent's contention that the Appellant could have applied for and obtained a permit without first having been called upon to furnish particulars, is expressed in its Heads of Argument thus:

9 (d). "If protection and compensation are required by a "non-permit user" his course is to apply for a permit provided that he qualifies for it under section 69(2)(b) (new section)". (By "new section" is meant section 69(2)(b) as enacted in the 1970 Act and set out above).

But this part of section 69 follows directly upon subsection (2) and that contains the very provisions which created the duty to furnish particulars when called upon to do; the same applies to section 69(2)(b) both before and after it was retrospectively replaced by the 1970 enactment of the new subparagraph (b). Section 69(2)(c) read thus;

"(c) Any person referred to in paragraph (a) who is beneficially using the water abstracted, impounded or stored shall be entitled to a permit to be issued by the Board on such conditions as it may deem fit to impose, to enable him to continue to abstract, impound or store and use for such purposes as may be prescribed in such permit, such quantity

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of water as, in the opinion of the Board would have been apportioned or awarded to that person if an apportionment or permission could, in terms of this Act, have been made or given by a Water Court."

Obviously the Appellant could not have been required to do anything in or before 1969 by virtue of amendments effected only in 1970 but, in any case, it is quite clear that the old and the new subparagraph (b) provided and provides, respectively, for the issue of a permit to a person who has furnished the particulars required of him under subparagraph (a). The envisaged system of permits seem largely to depend upon the due furnishing by all prior dated users of the specified particulars. Section 19 and 20 of the 1963 Proclamation indicate that that was the position prior to the 1967 Act, and the latter so now, in the provisions of section 69 and 70, especially quoad the Respondent's hydro-electric undertaking and those users of water who might be affected by its operation, the Electricity Board referred to in section 70 being the Respondent.

It is vital to consider whether there is any provision of section 69 which had the effect of destroying or derogating from the rights which the Appellant undoubtedly had under section 20 of the 1963 Proclamation, for if there is not, those rights continue to exist as held by Pike, CJ. The only provision which could have that effect is section 69(1) but its providing that no person may abstract, impound, store or use water in a Government Water Control Area, save under the authority of a permit from the Board and on such conditions as may be specified therein, was expressly stated to be "except as provided in subsection (2)". Subsection (2)(a) expressly deals with persons who were abstracting water prior to the constitution of the area as a Government Water Control Area, who, like the Appellant, had not obtained a permit, and made clear provision as to the circumstances in which a permit was to be obtained by such persons.

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The words, "except as provided in subsection (2)" are particularly important, for there is no express provision in subsection (2) stating that such persons as are referred to in paragraph (a) will continue to exercise their existing rights pending the issue to them of permits nor, indeed, is there stated in express terms, any mode by which such persons may abstract water save by means of a permit. What then, is the mode, other than a permit, which falls within the other exception in subsection' (2) to what is said in

subsection (l) that no person may abstract public water within the area except under the authority of a permit? The answer seems to be pretty clear, viz., that it was intended and expected that the Minister would call upon the persons referred to in subparagraph (a) to furnish the specified particulars and that it was only if such particulars were not furnished by them, that such persons as are referred to in subparagraph (a) would no longer be entitled to abstract water in the way in which and to the extent that they had, up to the coming into operation of the 1967 Act, been so entitled, and, therefore, necessarily, that they will continue to be so entitled until the permits are duly issued.

The 1967 Act provided for other kinds of permit quite different from those to which persons were entitled in terms of section 69(2)(b) (of. section 18 (6) and sections 71 et seq.) and the Legislature in section 70(5) has manifestly been studious to refer not merely to persons possessing permits under section 69(2)(b), but to those who are entitled to permits thereunder. The Appellant is such a person, with the result that the Respondent will not be free from an obligation to pay compensation to him, if his statutorily authorised quantity of water is reduced, after he has obtained the permit to which he is entitled. As has been indicated he can obtain this permit only after he has been required by the Minister to furnish the specified particulars. As he does not, as yet, possess the permit to which he

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is entitled, he was not, and could not be, entitled to be compensated under the provisions of section 70 for the cutting off of his supply of water. Equally, however, (assuming that section 20(4) of the 1963 Proclamation was no less absolute in its terms than section 20(5), a question with which I next deal) the Respondent was not entitled to cut off his water except under authority from the Board, and if it could not get that authority because it can be granted only in respect of permit-holders who became entitled to their permits under section 69(2)(b), it follows that what the Respondent did was an infringement of the Appellant's rights, unless it can be said that Respondent's rights override those of the Appellant otherwise than by way of the provisions of section 70(3). I have not been able to find in the language of section 20(5) of the 1963 Proclamation any words more absolutely according rights to the Respondent than those of section 20(4) according rights to the Appellant. Clearly, subsection (5) gave the Respondent a right to a permit to abstract, impound, store or divert "such of the water thereof (i.e., of the public stream) as it may require for (its) purposes and on such conditions as the Resident Commissioner may deem fit", but the language of subsection (4) is no less absolutes "any prior dated user may continute to abstract, impound or store the quantity of water which he was lawfully abstracting ..... unless he fails to comply ..... to the Resident Commissioner's satisfaction with the notice issued to him in terms of subsection (2)." The difference between the Applicant's rights under the permit to which he is entitled and those of the Respondent under its permit lies in the consideration that the latter, by written application, may obtain the Board's authority to reduce the quantity of water to which the Appellant is entitled, and that the Applicant has no corresponding course open to him.

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Whilst the Respondent is under no obligation to induce the Minister to call for the specified particulars from the Appellant and issue to him the permit to which he is entitled, yet, because until the Appellant has had the permit issued to him he cannot obtain compensation under section 70, he is necessarily thrown upon his remedy of an action for damages for an infringement of his statutorily continued rights.

Before concluding upon the legal question, I revert once more, but briefly, to the situation of the Appellant as a lower prior dated user. The Respondent's rights, as far as the Little Usutu River is concerned, as set out in its permit, are (l) to store water upstream of the Mkinkomo Weir in the amount of approximately 3000 acre feet, and (2) to divert from that reservoir, a maximum amount of 400 cusecs through a canal leading to the Edwaleni Hydro-Electric Power Station. These rights are, however, in accordance with paragraph 2 of the permit, expressly made "subject to the terms of the Electricity Proclamation, 1962" (1962 being a mistake for 1963), and subject to the duty of the Respondent to return the water it uses to the Greater Usutu River at a point near the Power Station.

There appear to me to be two ways in which the quantum of 3000 acre feet and the flow of 400 cusecs to

the Power Station could be maintained in times of drought, one by the obtaining of an increased flow into the reservoir in consequence of bringing about a reduction of the quantity of water taken off by upper users; and the other, by reducing, or cutting off, the flow from the reservoir to lower users. In order, however, to do either (or both) of these things lawfully, the Respondent could do them only subject to the provisions of the Proclamation and, by virtue of section 21 of the Interpretation Act of 1970 (Volume 3, under "General Administration"), that now means subject also to those provisions of the Water Act of 1967 which correspond to the repealed provisions of the Proclamation and

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subject, therefore, to the rights of others specifically entrenched thereby. To sum up on this aspect of the case:

(1) It was not contended, nor is there anything to show that, had the Respondent not been brought into existence, there would not have been sufficient water coming down to the Appellant to enable him to meet his irrigation requirements, despite the drought during the relevant period.

(2) The Statute makes no distinction whatever between upper and lower prior dated users, the rights of all prior dated users being to abstract the quantity of water which they were lawfully abstracting prior to the coming into existence of the Respondent.

(3) Insofar as the common law applies, if it applies to all (which I do not think it does or can do) the Respondent's rights as a tertiary user are clearly inferior to those of the Appellant, notwithstanding that he is a lower user, because his user is secondary.

As regards the question whether, otherwise, the Appellant showed good cause for leave to be granted to institute the proposed action, I am bound to say that I think that the learned Chief Justice went too far in saying (a) that section 54(1) of the 1963 Proclamation required the Appellant "to do only what any reasonably prudent person would do without being required", and (b) that the applicant's "laxity in failing to make any complaint in writing" to the Respondent timeously, was a ground for refusing leave. After all, it is when a person fails to notify the Respondent in writing of his intention to take action against it for damages arising ex delicto within a month of his becoming aware of the event giving rise to such damage that the leave of the Court to proceed is required. It seems to me to be clear enough that neither the Appellant or his Attorney, on the one hand, nor any responsible person

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representing the Respondent, was aware of the existence of section 54(1) until a long time after, not merely the event which gave rise to the alleged damage, but after the Appellant had admittedly communicated in writing with the Respondent on the subject. At no time was it suggested by the Respondent, until well after the application for leave was launched that he was out of time. Indeed, there were admittedly general discussion during which the Appellant was manifestly trying to get the Respondent to make a payment to him in respect of his alleged loss and, as late as 2nd December, 1969, "the Respondent's attorney wrote to the Appellant's attorney saying, "As at present advised the Board disputes liability and it is for your client to decide wether he wishes to proceed with an action". The facts earlier recited in this judgment appear to me to reveal that the Appellant, not being aware, any more than responsible persons representing the Respondent were aware, of the prescriptive period provided for in section 54(l) of the Proclamation, was taking active steps to obtain redress in respect of the alleged consequences of his water supply being cut off.

As regards the Appellant's statement that he reported in February, 1969, to the employee of the Respondent whose name he thought might be Langley, Pike, C,J., said, "It is surely not unreasonable to expect that if this occured, immediately thereafter the applicant would have written to the Board confirming Mr. Langley's inspection and action." We do not know to what extent the Appellant, if literate, was accustomed to putting matters of concern to himself in writing, and his account of what he did can scarcely be said to be improbable merely because he did not confirm in writing what he says happened,

particularly bearing in mind that a drought had begun to manifest itself, and that it was, in consequence, very likely indeed that he would want to use water from the river to irrigage his crops. The circumstantial account he

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gives of the matter "being reported "back "by radio does not bear a prima facie appearance of improbability, nor has it "been suggested "by the Respondent that it was not the practice for their field men to make reports "by radio. It does not seem to "be surprising that no record of such a report was to "be found in the Respondent's files for, after all, what was "being reported, viz., that the Appellant's supply of water had "been cut off, was perfectly well known to the Respondent which, as it transpired, cut it off in order that it should have sufficient supplies of water for its own. purposes. In any case, of course, the complaint was not an intimation that the Appellant intended to take action against the Respondent for damages. But that is hardly to "be wondered at unless it was clear to the Appellant that he would suffer damage, i.e., that no timely rain would come.

As regards the prejudice which it is claimed that the Respondent has suffered "by not having "been informed in writing that the Appellant intended to "bring an action for damages within the prescribed time, I am "bound to say that it does not apppar to me that such prejudice has adequately "been made to appear. Since there was a drought,and since it had resulted in the cutting off of the Appellant's supply of water, the Respondent could, in the first place have hardly failed to realise that farmers in the situation of the Appellant would suffer damage if no timely rains came to save their crops. When it did "become quite clear from the written communications that the Appellant was intending to "bring proceedings if his manifest efforts to avoid having to do so by negotiating a settlement should fail, the Respondent waited until August, 1970, "before sending Mr. King to make a survey "but, in any case, if Mr. King's affidavit represents the truth it goes very far indeed to show that the Respondent suffered little prejudice, if any, in not being informed, in writing, in March, 1969, of Appellant's intention to bring an action for damages. I

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am far from "being persuaded, in all the circumstances of this case, that, if the Respondent had "been informed in writing strictly in accordance with the provisions of section 54(1), instead of in July, the Respondent would have made the survey much earlier, if any earlier, than it did. As regards the extent to which the Appellant had planted his fields and had growing crops at the end of January, 1969, the burden will clearly "be on him, as it will "be prove that the failure of his crops was, apart from this, solely due to his supply of water "being cut off. The prejudice which Mr. Richardson says the Respondent suffered is expressed thus in subparagraphs (d) and (e) of an unnumbered paragraph of his affidavit, at p. 31 of the record, dealing with paragraphs 16 and 17 of the Appellant's founding affidavit:

"(d) Furthermore, the Respondent's representatives would have been able to examine the maize crop to see if anything could be done to assist the Applicant and to gauge for itself the potential loss which might be suffered by the Applicant.

(e) Instead of this, as matters now stand, the Board received no notification until July, 1969. At that stage there was no evidence of what the crop might or might no have been, and the Respondent was unable to do anything to remedy the position nor was it possible for the Respondent to make a full investigation of the circumstances surrounding the alleged loss."

It will be seen that this is expressed in very general terms and, moreover, does not say that it would not have been possible after July, 1969, to obtain fully reliable evidence as to the extent to which the Appellant's fields had growing crops of maize upon them during the month of February, 1969,

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in which the drought prevailed.

I am persuaded, for the foregoing reasons and because of the acknowledged fact that at least about 35 acres of the Appellant's farm could have been irrigated during the relevant period if his water supply had not been cut off by the Respondent, that good cause for obtaining relief was shown to exist, that the appeal should accordingly be allowed, and that an Order should be made as follows:

(1) The appeal is allowed with costs and the Order of the Court below, dismissing the application with costs, is set aside.

(2) The following Order is made in place thereof: The Applicant is granted leave, in terms of section 54(1) of Proclamation No. 10 of 1963, to institute an action against Respondent for damages, provided that such action is instituted within six weeks of the date of issue of this Order.

(3) Subject to paragraph (4) of this Order, the Respondent's costs in respect of the proceedings in the Court below are reserved for decision by the trial Court, the Appellant to pay his own costs in respect of such proceedings.

(4) If the said action be not instituted within the said peroid of six weeks, or if it be dismissed for want of due prosecution the Respondent will be at liberty to apply to and entitled to obtain from the High Court an Order requiring the Appellant to pay the Respondent's costs in the Court below.

(Sgd)

(A. Milne)

Judge of Appeal