IN THE SWAZILAND COURT OF APPEAL

HELD AT MBABANE

CASE NO.1/93

In the matter between:

VALLEY ESTATES (PROPRIETARY)

LIMITED First Appellant

JOSEA GEORGE POTGIETER Second Appellant

and

NSOKO PLANTERS LIMITED First Respondent

INGVAVUMA ESTATES (PTY) LIMITED Second Respondent
YEZIMBALI ESTATES ESTATES (PTY)

LIMITED Third Respondent

BARRY FORBES Fourth Respondent

FRANCOIS VAN HEERDEN Fifth Respondent

GERHARDUS SCHEEPERS Sixth Respondent

JUDGMENT

23rd April 1993

BROWDE JA:

All the parties to this dispute are riparian owners of land on the banks of the Ngwavuma River. Due' to a very severe and continued drought in the country water has for many years been a very precious commodity and water affairs in the country are governed by the Water Act 1967. In terms of that Act General Notice No. 4 of 1976 was published in the Swaziland Government Gazette on Friday January the 16th 1976 in terms of which there were published the apportionments of water for each riparian owner as determined by the Water Apportionment Board for what was known as the Ngwavuma Water Control Area.

It appears that late in the year 1991 or early 1992 a dispute arose between the First Appellant on the one hand and the Respondents on the other. According to allegations made by the Respondents the First Appellant was using more than its apportioned share of the water from the river. It seems that complaints made by the Respondents fell on deaf ears and as a result the Respondents took the law into their own hands with the intention of putting Appellants' pumps out of commission. This culminated on the 24th of February 1992 in the First Appellant launching an application in which it sought an order inter alia interdicting the Respondents and their directors, shareholders, managers and employees from trespassing on the First Appellant's farm land and from entering the First Appellant's pump house and from diverting or disturbing the flow of water to the . First Appellant's pump house. This application was set

down for hearing on 27 February 1992 but came before the Court only on the following day. On that day the Respondents were given until 6th March 1992 to reply to the allegations of the First Appellant and by consent an interim order was made in terms whereof the Respondents undertook not to enter the First Appellant's property unlawfully and not to interrupt or interfere with the flow of water to the First Appellant's pump house. The costs thus far were reserved.

On 6th March 1992 the Respondents delivered their answering affidavits in which they prayed that the application launched by the First Appellant be dismissed with costs and on the strength of which affidavits they purported to bring a counter-application against the First Appellant claiming inter alia an order that the First Appellant be interdicted and restrained from drawing more than 12.46% of the natural flow of the water in the river at zone 31 as allocated to it in terms of the General Notice No. 4 of 1976. On that day the parties drew up a consent order which was made an Order of Court.

Because it is this order which has given rise to the present appeal I set put the terms in full, namely -

"It is ordered that by consent and without prejudice to the parties, pending determination of this application:

1. That the Respondents' undertaking (namely the undertaking not to enter upon the Appellants' premises unlawfully) is to remain in force;
2. That the Applicant undertakes not to exceed its water allocation from the Ngwavuma River as stated by Government Gazette No. 4/76 read with Annexure "D" to the founding affidavit. (Annexure "D" was a letter from the Ministry of Works, Power & Communications to the Managing Director of one of the riparian owners namely Swaziland Cotona Cotton Ginning Co. Ltd the terms of which are irrelevant to the present proceedings).
3. That the Applicant will allow the monitoring of the water pumped by the Applicant from the Ngwavuma River. Such monitoring to be carried out in the presence of either the Station Commander of Lubuli Police Station or his representative or a member or representative of the Water Apportionment Board. Such monitoring to be carried out by any riverine user other than one cited as a Respondent or such Respondent's employees. Any records of measurements to be furnished to both Applicant and the Respondents.
4. That the Applicant shall be entitled to be present when any measuring is conducted.
5. That the costs to be reserved. That the application is postponed to a date to be arranged with the Registrar."

On the 25th of March 1992 the First Appellant delivered a notice of application giving notice that it intended to make application for an order inter alia setting aside the notice of motion and affidavits in support thereof of the Respondents,

namely those in the counter-application, as being irregular in terms of Rule 30 of the High Court Rules. The Respondents thereafter on 1 April 1992 delivered a notice of intention to oppose the said Rule 30 application and on the 23rd of April 1992 filed a notice in reply setting out the grounds on which the First Appellant's application in terms of Rule 30 was to be opposed.

Subsequently the matter was set down for hearing on 21 September 1992 but on 14 September 1992, on certificates of urgency, the Respondents brought two urgent applications. They sought orders that

the Second Appellant be joined as a party to the application and that the First Appellant and the Second Appellant be convicted of contempt of court for acting in breach of the Order of Court of 6 March 1992. This application elicited a further notice of motion emanating from the First Appellant and dated 18 September 1992 in terms whereof the First Appellant sought an order inter alia setting aside the notice of motion and affidavits in the contempt application as being irregular in terms of Rule 30.

The Second Appellant on the same day delivered a notice of motion in terms of which he claimed an order setting aside the notice of motion seeking to join

him also on the basis that it was irregular in terms of Rule 30.

Thus it was that on the 21st of September 1992 there came before the learned Chief Justice in the Court a quo the multiplicity of applications and counter-applications. Because of the requirement of Rule 30 that no further step be taken before the application for an order declaring a proceeding to be irregular the Appellants filed no affidavits in answer or reply to the matters in relation to which Rule 30 applications were made. The argument before the learned judge a quo ran into two days whereupon judgment was reserved. Thereafter, however, the learned judge mero motu decided to hold an inspection in loco before delivering his judgment, such inspection being held on Friday 25 September 1992. On 1 October 199 2 the Respondents served supplementary affidavits on the Appellants' attorneys of record which affidavits were received by and considered by the Court a quo. When the case was called on 7 October 1992 the learned judge a quo postponed the matter until 16 October 1992 and, the Second Appellant not yet having been joined, the Appellants were given until 13 October 1992 to file further affidavits. On the latter date the

First Appellant gave notice of an urgent application in terms of Rule 30 to be heard as a matter of urgency on Friday 16 October (the date to which the case had been postponed) for the setting aside of the aforesaid supplementary affidavits. Once again, because of the wording of Rule 30, no affidavits were filed. After holding yet another inspection in loco on 20 October 1992 the learned Chief Justice delivered his judgment on 21 October 1992. It seems that in that judgment the Court a quo did not decide the main application brought by the First Appellant or the counter-application brought by the Respondents thereto, but the learned judge confined himself to a consideration of the application to join the Second Appellant and the application for an order committing the First and Second Appellants for contempt of court. In his judgment the learned Chief Justice, after setting out the background and referring to the applications before him said the following:

"On all of that I think that there are three broad issues, which in this particular case I would put in the following order: the first is whether a wilful breach in bad faith of the undertaking in paragraph 2 of the order of 6 March by Valley Estates could constitute a contempt of court by the company or its managing director, Mr Potgieter.

The second is whether the various legal and

technical points taken on behalf of Applicant and Mr Potgieter affect the outcome of the Respondents' application.

The third is whether in fact there was such a breach."

The learned judge a quo then proceeded to grant the application to join Mr Potgieter and after reviewing the evidence before him (which of course were the unanswered allegations made by the Respondents) came to the conclusion that the First and Second Appellants had, in wilful breach of paragraph 2 of the Order of Court, extracted more than the company's permissible quantity of water from the river. Although argument was, before us, directed also at showing that the Appellants had not permitted monitoring of the water pumped by the Appellants from the Ngwavuma River in contravention of paragraph 3 of the order, the learned judge a quo did not seem to make any finding in this regard. Although he refers to the specific assertion that from 25th to 30th March Valley Estates refused to switch off its pumps to allow its abstraction to be monitored and that it refused again on the 1st of April when the request was made by the monitor of the Water Apportionment Board the learned judge then goes on to say -

"I think it is to be properly inferred that Valley Estates during the period of monitoring was extracting more than its

agreed quota of 12-46% of the flow and was therefore acting in contravention of the order of 6 March".

In my view the learned judge was correct in not making a finding in regard to the question of the monitoring. Although it is true that the deponents for the Respondents said that it was required that the Appellants should switch off their pumps in order for there to be a proper reading of the quantity of water being pumped by the Appellants, there is no explanation for that contention on the papers and there is certainly no specific agreement to switch off the pumps in the order made by consent. All that the Appellants undertook to do was to allow the monitoring of water pumped by the Applicant from the Ngwavuma River. There is much to be said, I think, for the submission in this regard made by Mr Du Toit who, together with Mr Fine, appeared for the Appellants, that the persons responsible for the monitoring of water pumped by the Appellants could have done so with reference to the water which reached the farm lands of the Appellants. The real issue in regard to the contempt proceedings is, therefore, whether or not, in breach of the Order of Court, the First Appellant exceeded its water allocation as provided for by the Government Notice No. 4/1976. Although in the Court a quo Mr

Zar, who appeared for the Respondents, argued that the breach had to be proved on a balance of probabilities he conceded in argument before us, albeit reluctantly, that such breach had to be proved beyond reasonable doubt. I am of the view that this concession is rightly made. In S__v Beyers 1968 (3) SA 70 (AD) at p. 8OE-G, Steyn CJ said that contempt of court is an offence in respect of which a normal sentence can be imposed. Although in Waterston v Waterston 1946 WLD 334 at 337 Clayden J appears to have found that the onus of proof in contempt proceedings entails the balance of probabilities only this, in my view, is wrong. It is hard to visualize a criminal offence being proved on a balance of probabilities particularly when it might result in the accused being sentenced to a term of imprisonment. I therefore prefer the view expressed in Clement v Clement 1961 (3) SA 861 (T), a three judge decision of the Transvaal Provincial Division, in which it was held that the non-compliance with the order (in order to found a charge of contempt of court) must not only be wilful, but also mala fide. Galgut J. as he then was said "whilst, as already stated, his own papers suggest and even raise the probability that he planned to keep the child here, I am not satisfied that the papers

show beyond all doubt that he was mala fide in so doing." Mr du Toit, in this regard, referred us to Law of Contempt by Borrie & Lowe in which, in dealing with the law of England, the learned authors say (at

p. 372) "it has also been established that since contempt of court as a whole is an offence of a criminal character, it is necessary even in cases of civil contempt to prove the offence beyond all reasonable doubt." This was the view expressed in the case of Re Bramblevale Ltd (1969). 3 All ER 1062 (C.A.).

I turn now to the wording of the General Notice.

In paragraph 3 thereof the apportionments in respect of the Ngwavuma Water Control Area (in which Appellants' farm lies) are said to be calculated "as a proportion (percentage) of normal September flow related to a gauge station." (My emphasis). And in the explanatory notes on the schedule (which schedule sets out the percentages of "normal flow" to which each riparian owner is entitled) , it is stated "on the Ngwavuma, until more gauge station are constructed, abstractions have to be related to flows measured at gauge station No. 8 situated a few kilometres upstream of Nsoko". Mr Du Toit has contended that since there is no evidence whatsoever of any reading of

the flow at gauge station No. 8 there was no proof of a breach of the order, let alone proof beyond all reasonable doubt. To counter this Mr Zar submitted that once it is clear from other evidence that the Appellants were using more than their rightful allocation of water it was not necessary for any evidence to be given regarding gauge station 8 or the flow at that station. I cannot agree with that submission. No reason could be advanced why the reading was not made at gauge station 8 and since, as I have already pointed out, this is a criminal offence it is insufficient in my view to rely on inferences, and inconclusive ones at that, when no reason could be advanced why the flow was not read at gauge station No. 8. One of the reasons why I think the inferences sought to be drawn by Mr Zar are unreliable is that in terms of explanatory note 5 "the method of apportionment adopted assumes that the flow apportioned will be used either for 24 hours each day or alternatively be diverted to storage for later use." Prima facie it seems to me that any particular reading at any given moment is, therefore, inconclusive unless correlated with what is taken over a 24-hour period. In the result, although there is serious suspicion that the First Appellant was using more than its

rightful percentage of the water, this was not proved beyond reasonable doubt and- that consequently the conviction for contempt of court was not justified. Having decided that, it seems to me to be irrelevant whether the joinder of the Second Appellant was right or wrong. His conviction must also be set aside.

With regard to the costs of the proceedings in the Court a quo Mr Zar has submitted that a good deal of the argument in that Court concerned the applications brought by the Appellants in terms of Rule 30. These applications raised various technical objections to the application for joinder and the contempt proceedings. The learned Chief Justice found there was no merit at all in any of the various technical objections and consequently dismissed them. No reason has been advanced in this Court which has persuaded us to take a different view from that adopted by the learned Chief Justice including the granting of costs on the attorney and client scale. We have been invited by Mr Zar to indicate to the Taxing Master what proportion of the proceedings in the Court a quo was taken up by the argument on the Rule 30 applications. With the information at our disposal it is not possible to do that with any

accuracy particularly as we do not intend perusing in detail the volumes which have been placed before us on appeal containing a transcript of the argument of counsel in the Court a quo. On a somewhat arbitrary basis, therefore, but in an effort to do justice between the parties, I have come to

the conclusion that justice between the parties would be served if I found, as I do, that two-thirds of the time in the Court a quo was spent on the merits of the Rule 30 applications.

To sum up, therefore, I would make the following orders in this appeal:

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

2. Two-thirds of the Respondents' costs in the Court a quo must be paid by the Appellant on the attorney and client scale.

J. BROWDE

JUDGE OF APPEAL

I agree, and it is so ordered

D.A. MELAMET

PRESIDENT, COURT OF APPEAL

I agree

B. DUNN

ACTING JUDGE OF APPEAL.