REPUBLIC OF NAMIBIA Not Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00266

In the matter between:

LENN DE JAGER **FIRST APPLICANT**
PHOENIX FARMING (PTY) LTD **SECOND APPLICANT**

and

GOTTLOB KATJIRUA **FIRST RESPONDENT**
JOGBETH KATJIRUA **SECOND RESPONDENT**

Neutral citation: *De Jager v Katjirua* (HC-MD-CIV-MOT-GEN-2021/00266) [2021] NAHCMD 405 (3 September 2021)

Coram: ANGULA DJP
Heard: **12 August 2021**
Delivered: **3 September 2021**

Flynote: Applications and motions – Urgent application – Interdict – Requirements for interim interdict satisfied.

Summary: This application concerns a dispute regarding water supply from the respondents' servient tenement to the applicants' dominant tenement – The applicants seek an interim interdictory order against the respondents from

interrupting the supply of water from their tenement to the applicants' dominant tenement, pending the final determination of an action between the applicant and the respondents which is pending before this court.

Held; that the application was urgent.

Held; that an interim interdict and spoliation are two separate causes of action or type of proceedings with distinct requirements and are thus capable of being sought independently of each other.

Held; that after the notarial agreement terminated on 31 May 2021, the respondents continued supplying water from their farm to the first applicant's farm. Therefore such water supply could only have been made based on the rights and obligations flowing from the option agreement that existed between the parties.

The court accordingly held that the matter could be heard on urgent basis and granted the interim interdict.

ORDER

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1. The applicants' non-compliance with the Rules of this Court, if any, relating to the form and service and time limits as set out in rule 73(3) of the Rules of this Court, are dispensed with and the matter is heard as one of urgency.

2. The respondents are interdicted and restrained from interrupting or interfering with, hindering or obstructing in anyway whatsoever the water supply (i) from the respondents' farm being the remainder of Portion 3 (La Rochelle) of Farm No. 444 situated in the Registration Division "L", Omaheke Region to (ii) the first applicant's farm, being Portion 4 (a Portion of Portion 3) of Farm No. 444 situated in the Registration Division "L", Omaheke Region, and (iii) which water supply was previously the subject of Notarial Deed No. K92/2011S, pending the

final determination of case number HC-MD-CIV-ACT-OTH-2021/02392 pending before this court.

3. The respondents, who opposed this application, are to pay the applicants costs, jointly and severally the one paying the other to be absolved, including the costs occasioned by the employment of one instructing counsel and one instructed counsel.

4. The matter is removed from the roll and is considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This application concerns a dispute regarding water supply from the respondents' servient tenement to the applicants' dominant tenement. The applicants seek an interim interdictory order against the respondents from interrupting the supply of water from their tenement to the applicants' dominant tenement pending, the final determination of an action between the applicant and the respondents which is pending before this court.

The parties

[2] The first applicant described himself as a businessman residing at Farm Okatjeru No. 181, Gobabis district, situated in the Omaheke Region, Republic of Namibia. He is the director of the second applicant.

[3] The second applicant is a company with limited liability registered and incorporated in accordance with companies' laws of the Republic of Namibia with its

principal place of business situated at No. 14, Marjorie Clark Street, Olympia, Windhoek, Republic of Namibia.

[4] The first respondent is Mr Gottlob Katjirua, a pensioner residing at Farm La Rochelle a Portion of Farm 444, Omaheke Region, Republic of Namibia.

[5] The second respondent is Ms Jogbeth Katjirua, also residing at same address as the first respondent. It would appear that the respondents are husband and wife.

[6] For the sake of convenience, the parties hereto shall be referred to as follows: I will refer to the first applicant as 'Mr De Jager' or 'the first applicant'. The second applicant shall be referred to as 'Phoenix.' The first and second applicants will jointly be referred to as 'the applicants'. I will refer to the first respondent as 'Mr Katjirua'. The second respondent 'Mrs Katjirua. The first and the second respondents will be jointly be referred to as 'the respondents'.

Factual background

[7] Mr De Jager is the owner of Portion 4 of Farm No. 444. As indicated earlier he resides on that farm. He deposed to the founding affidavit. According to him, Phoenix shares occupation with him Portion 4 and shares the supply and use of water supplied to Mr De Jager's farm from the respondents' farm. They are both conducting farming activities and sharing possession and occupation of Mr De Jager's farm.

[8] According to Mr De Jager, his farm is dependent upon the respondents' farm for the supply of water. For that reason, he and the respondents concluded a Notarial Deed of Water Servitude and Servitudes of Aqueduct with Borehole and Pump Site and Pipeline Servitude ('the Agreement') on 31 March 2011 which was subsequently registered in the Deeds Office.

[9] It is common cause that the agreement was valid for a period of 10 years calculated from 31 March 2011 and it terminated on 31 March 2021. During the duration of the agreement and pursuant to the terms thereof Mr Katjirua pumped

water over a pipeline from his farm to Mr De Jager's farm. The pipeline had been constructed at Mr De Jager's cost. However Mr Katjirua paid Nampower's account in respect of electricity consumption he incurred in pumping water to Mr De Jager's farm.

[10] Clause 10 of the agreement provided that Mr De Jager, as the owner of the dominant tenement shall before the expiry of the ten year period drill two boreholes for water on his farm; and that the depth of the two boreholes must reach 150 meters per borehole. In the event it transpired that the boreholes yield insufficient or no water is found, Mr De Jager, as owner of the dominant tenement, shall have the right to drill two boreholes on Mr Katjirua's farm and subsequently register a new Notarial Borehole Servitude in favour of the dominant tenement.

[11] Pursuant to the Agreement, during 2019 and 2020, Mr De Jager drilled two boreholes on his farm with a depth of 150 meters which turned out to yield insufficient water. He then proceeded, as per agreement, and drilled two boreholes on Mr Katjirua's farm. He further caused the portion of Mr Katjirua's farm over which he planned to lay the water pipeline to be surveyed and approved by the Surveyor-General. Thereafter he presented Mr Katjirua with a draft power of attorney giving a person in the notary's office the power to appear before a notary to execute the new Notarial Deed. It was at the juncture where the problem which led to the current dispute, arose.

[12] Mr Katjirua refused to sign the power of attorney because according to him he needed time to consider the documents and seek legal advice. It is his case that having done so, he established that according to the surveyed diagram, the first applicant proposed to create a new pipeline in the middle of his farm and to install pumps and other machines and equipment at their sole discretion along an area six (6) meters wide. According to Mr Katjirua, the proposed servitude, if implemented, would diminish his enjoyment of his farm in many ways. He accordingly made a counter-proposal through his lawyer. Mr Katjirua deposed further that, without reaching a consensus on the path of the pipe line, the applicants commenced de-bushing the area over which the water pipeline was to be laid. Mr Katjirua, through his lawyer, accordingly instructed the applicants to cease with their operation.

Thereafter, the applicants ceased and instituted an action in this court against the respondents, seeking an order directing the respondents to sign all documents necessary to execute and register a new Notarial Deed. That action is opposed by the respondents and is currently pending before this court.

[13] As regards the event which triggered the present application, according to Mr De Jager on 19 May 2021 he was informed by his employees residing on his farm that the water reservoir was almost empty and no water was being pumped by the respondents. Thereafter he contacted Mr Katjirua who restored the water supply. At the end of May 2021, the supply of water to his farm was again interrupted. Mr De Jager's lawyer then addressed a letter to Mr Katjirua requesting him to cease interrupting the water supply.

[14] According to Mr De Jager on 23 June 2021, he and a certain Mr Hamman, a director of Phoenix, drove to his farm in order to attend to matters there. Upon arrival on the farm, they noticed that the level of the water reservoir was insufficient. They then drove to Mr Katjirua's farm. Once there, they observed that his water reservoir was full to its capacity however Mr De Jager's water pump was switched off. Upon enquiry they were informed by Mr Katjirua's employee that he instructed them not pump water to Mr De Jager's farm. Thereafter on 25 June 2021, Mr De Jager's lawyer addressed a letter to Mr Katjirua in which an undertaking was demanded to the effect that water supply would be restored and the supply thereof would continue pending the outcome of the action pending before court.

[15] On 1 July 2021, the respondents' legal practitioner responded by letter and therein recorded that the respondents deny all the allegations made in the letter under reply. The letter further pointed out that the agreement that existed between the parties had been terminated and accordingly there was no obligation on the respondents to supply water to the applicants' farm; and that the respondents had simply been supplying water to the applicants in good faith while the applicants were finding other means in the absence of a valid servitude agreement to supply water to their farm. The letter further pointed out that Mr De Jager had thus far refused to consider the respondents' proposed terms of the new agreement.

Relief sought

[16] The applicants seek the following relief namely:

> '1. An order that the respondents forthwith restore the applicants' peaceful and undisturbed possession of the water supply from the respondents' farm to the first applicant's farm which water supply was previously the subject of a Notarial Agreement which expired on 31 March 2021;
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> 2. An order interdicting and restraining the respondents from interrupting or interfering or obstructing the water supply from the respondents' farm to the first applicants farm which water supply was previously the subject of a Notarial Agreement which expired on 31 March 2021 pending the determination of the action instituted by the first applicant against the respondents currently pending before court; and
>
> 3. An order for costs of suit.'

Urgency

[17] Urgency is contested by the respondents. This application was originally set down for hearing on 9 July 2021. On that day, Ms Pack for the respondents moved an application for postponement of the matter for the reasons *inter alia* that she could not consult with the first respondent because he had symptoms of COVID and was advised by his doctor to go into self-isolation. As a result the parties reached an interim arrangement which amongst, provided for the supply of water by the respondents to the applicants farm and further set out the timeline for exchanging pleadings. The document further recorded that: The aforesaid arrangement:

> '4.5.1 Is made without prejudice to any of the parties' rights in respect of this application and without prejudice to any right or defense that either party may rely on in this application; and
>
> 4.5.2 Does not amount to a concession by any party of the existence of any right by the other.

> The terms contained in the document was made an order of court and the matter was postponed to 12 August 2021 for hearing.'

[18] When the matter was called on 12 August 2021, the parties had exchanged the pleadings as previously agreed. Mr Nekwaya, for the respondents relying on the reservation of his clients' right previously reached between the parties on 9 July 2021 informed the court that the respondents persist with issue of urgency.

[19] The applicants bear the burden of proving that the matter is urgent. Ms Van der Westhuizen for applicants points out in her heads of argument that in deciding the issue of urgency, the court assumes that the applicants' case is a good one and that the applicants are entitled to the relief sought. Counsel submits further that the application was brought with reasonable promptitude and that the circumstances as set out in the affidavit render the matter urgent.

[20] Mr Nekwaya submitted that the matter is not urgent. He pointed out that the applicants knew from 23 June 2021 that the respondents had interrupted the supply of water to their farm but that it took them until 2 July 2021 to launch the present application. Furthermore, the first applicant knew since 31 March 2021 that he had no servitude of water supply over the respondents' farm.

[21] Rule 73(3) and (4) stipulates that the applicant for urgency must explicitly state: (a) the circumstances which render the matter urgent and (b) the reasons why the applicant claims he or she could not be afforded substantial redress at a hearing in due course.

[22] In this regard the applicants point out that following the interruption of the water supply resulted in a situation whereby 193 cattle had insufficient water and that the situation was critical to the extent that the cattle would be left to suffer and eventually die. They further point out that moving the cattle to another place was not an option; that they have no other grazing land available. The cattle consist of cows, weaners and calves and the applicants cannot be expected to do away with them or to slaughter them.

[23] It is correct that the agreement for the supply of water expired on 31 March 2021. However, no serious interruption of supply of water appeared to have taken place shortly thereafter. Therefore, that date cannot be considered to have triggered the present application. In my view, the trigger date is 23 June 2021. The applicants caused a letter to be addressed to the respondents on 25 June 2021, demanding an undertaking from the respondents within three days that they would not interrupt the water supply to their farm.

[24] In this regard, it has been held *inter alia* that a party should not rush to court before exploring all the options such negotiation in an attempt to settle the dispute.[1] That is precisely, what I think, the applicant tried to achieve in the present matter. In any event, no response was received before the expiry of the set deadline. The three days deadline expired on 30 June 2021. The application was launched two days thereafter and was set down for hearing on 9 July 2021. In my view, the applicants acted the necessary promptitude to bring the present application after they discovered that the supply of water had been interrupted.

[25] I am also in agreement with Ms Van der Westhuizen's submission that the issue of urgency was ameliorated by the arrangement made by the parties on 9 August 2021 where *inter alia* an undertaking was made by the respondents not to interrupt water supply from their farm to the applicants' farm. In my view, no prejudice has been suffered by the respondents.[2]

[26] I am therefore satisfied that on the facts and under the circumstances deposed to by the applicants, that they have satisfied the twin requirements of urgency stipulated by rule 73 and I accordingly, hold that the matter is urgent. I turn to consider the relief claimed.

Whether the two types of relief sought are independent of each other

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[1] *Shetu Trading CC v The Chair of the Tender Board for Namibia and Others* (A 352/2010) [2011] NAHC 179 (22 June 2011) at para 11. See also, *Petroneft International and Others v The Minister of Mines and Energy and Others* Case No. A 24/2001 para 32.

[2] *Old Mutual Life Assurance Company of Namibia Ltd v Old Mutual Staff Pension Fund* 2006 (1) NR 211 HC at 218.

[27] Ms Van der Westhuizen submits that the relief of spoliation and interim interdict are separate and constitute two distinct causes of action. Accordingly, they are pursued in these proceedings independently of each other and therefore the success of one is not dependent upon the success of the other.

[28] Mr Nekwaya for his part contends that the relief should have been sought in the alternative. In this regard, during oral submission, counsel submitted, as I understood him, that the applicants must first establish that they are entitled to a spoliation before they can pursue the interdictory relief.

[29] I do not agree with Mr Nekwaya's submission for the reason that each type of relief has its own requirements to constitute a cause of action. An application for spoliation requires a final order whereas an application for an interim interdict is temporary in nature and is dependent upon something else to happen, in the present matter the finalisation of the pending action. I therefore hold that in the present matter, neither of the type of relief sought is dependent on the other relief. On that premise, I proceed to consider the interim relief, which Ms Van der Westhuizen incidentally started off with in her written submissions notwithstanding the fact that the notice of motion started off with the prayer for a spoliation order.

Interim interdictory relief sought

[30] It is now trite that the requirements for an interim interdict are: a *prima facie* right, even though its subjected to some doubt; a reasonable apprehension of irreparable harm; the absence of an alternative relief; and that the balance of convenience favours the granting of interim relief.[3]

[31] It is further well established that if an applicant manages to establish a clear right, an apprehension of irreparable harm need not be established. Furthermore, the stronger the applicant's prospects of success on the merits the lesser the need for such an applicant to establish that the balance of convenience favours him or her.[4]

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[3] *Alpine Caterers Namibia (Pty) Ltd v Owen and Others* 1991 NR 310 (HC) at 313.
[4] *Webster v Mitchell* 1948 (1) SA 1186 at 1189.

Did the applicants prove a prima facie right?

[32] It also now well-established that the proper approach in establishing whether a *prima facie* right has been proven is to consider the facts as set out by the applicant together with the facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial.[5]

[33] As regards the question whether the applicants have established a *prima facie* right Ms Van der Westhuizen submits that even though the notarial agreement terminated by effluxion of time, the agreement vested some residual rights in favour of the applicant which survived the termination of the agreement and which are worthy of protection. Mr Nekwaya on the other hand submits that no other rights arose from the terminated notarial agreement.

[34] It is necessary to closely scrutinize the relevant terms of the agreement in weighing counsels' opposing contentions. In my view, the relevant clause of the agreement is clause 10 which I summarized earlier in this judgment. I reproduce it below in full:

> '10. The DOMINANT OWNER shall before the expiry of the ten (10) year period drill boreholes for water on the DOMINANT TENEMENT. The depth of two boreholes to be drilled will have to reach 150m per borehole and in the event that it transpired that insufficient or no water can be found on the DOMINANT TENEMENT the DOMINANT OWNER shall have the right to drill a borehole/boreholes on the SERVIENT TENEMENT and subsequently register a new Notarial Borehole Servitude in favour of the DOMINANT TENEMENT. The costs incidental to the drilling of the said boreholes and the registration of the boreholes will be for the account of the DOMINANT OWNER.' (Underlining provided for emphasis)

[35] It would appear to me that clause 10 of the agreement created an option in favour of the first applicant, as owner of the dominant tenement to enter into 'a new

[5] *Webster v Mitchell* 1948 (1) SA 1186.

Notarial Borehole' agreement. In this regard Christie[6] explains the nature of an option as follows:

'To understand the true nature of an option it is best to analyse into two parts – an offer to enter into the main contract together with the concluded subsidiary contract (the option contract.)

The learned author went on to say:

> "[A]lthough it is correct to describe an option as a continuing offer, this description is incomplete because … it omits the vital point the option is in itself a contract" '

[36] The option has also been discussed in Volume 5 LAWSA at para 117 as follows:

> '[It] now settled law that an option is to be construed as comprising two distinct parts: one an offer made by the offeror (grantor of the option) to the offeree (option holder) and the other a separate contract, a so-called *pactum de contrahendo*, between grantor and holder in terms of which the grantor undertakes to keep the offer open for a period of time.'

[37] In the present matter, the notarial agreement created an option in favour of the first applicant to be exercised before the expiry of the period of 10 years. In this regard, the first applicant had already accepted and exercised his option before the expiry of the stipulated period of 10 years by first drilling boreholes on his farm and when there was insufficient water found on his farm, he proceeded to drill boreholes on the respondents' farm as stipulated in clause 10 of the notarial agreement. It follows therefore, in my view, following the acceptance of the offer that a new agreement (the option agreement) came into existence. The option agreement created a contractual right enforceable against the respondents.[7]

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[6] The Law of Contract in South Africa 6th edition, p 57.
[7] Silberberg: Law of Property 1975 Edition at p 283.

[38] In my view, what transpired in the present matter is common and a well-settled practice especially in a lease agreements. In those agreements a landlord creates an option in favour of a tenant to be exercised say three months before the expiry of the current lease by the tenant informing the landlord of his or her intention to renew the lease agreement. In such a scenario, the option usually states that the lease is to be renewed on the same terms and conditions as the current lease. Alternatively, the option may stipulate that the new lease agreement will be on the same terms and conditions save that the rental amount shall increase by whatever amount. Alternatively the option will stipulate that there shall be no further option to renew.[8]

[39] By parity of reasoning, it would appear that when the first applicant exercised his option, he did so either tacitly or impliedly, on the same terms and conditions as the previous notarial agreement or some new terms and conditions as are to be negotiated and agreed upon by the parties, such as the path or track where the pipeline from the first applicant's two boreholes are to be laid over the respondents farm. The latter scenario appears to be the case in this matter, given the complaints by Mr Katjrua with regard to the area which has been cleared by the applicants where they intend to construct the pipeline.

[40] It would further appear to me that some terms and conditions have been incorporated in the option agreement. One such term allowed the first applicant to maintain (in the sense of limited ownership) the two boreholes on the respondents' farm. That term created a right for the first applicant to 'own' those boreholes and an obligation on the respondents to allow the first applicant to 'own' those boreholes. A further term is the one that stipulates that the first applicant shall register the new notarial at his own cost. If this was not the case, it would beg the question: On what basis does the first applicant hold the right to the boreholes situated on the respondents' farm? In this respect it bears mentioning that none of the parties contend that they entered into a different agreement in terms of which the first applicant maintains (or owns) those boreholes on the respondents' farm. It is not for this court to dissect which clauses of the old notarial agreement were incorporated in the option agreement.

[8] LAWSA Vol 14 par 192.

[41] In view of the conclusion I have arrived at, it follows that Mr Nekwaya's argument that no other rights arose from the terminated notarial agreement cannot stand and is liable to be rejected as it overlooks the fact that a new option agreement was created when the first applicant exercised his option.

[42] It is significant to note in this connection that the respondents do not dispute that the first applicant was entitled to drill the boreholes on their tenement. Mr Katjirua's gripe is that the applicants 'chose themselves where to drill without my involvement'. It further is to be noted that the respondents merely say that 'we do not agree to the proposed terms of the new Notarial Deed of servitude'. And that respondents have 'suggested various new proposals'.

[43] I am fortified in the foregoing view by the fact that it is common cause that after the notarial agreement terminated on 31 May 2021, the respondents continued supplying water from their farm to the first applicant's farm. In my judgement, such water supply can only have been made based on the rights and obligations flowing from the option agreement. This view is elaborated further below.

[44] The first applicant states at para 18 of his founding affidavit that 'the arrangement for the supply of water from the Servient Tenement to the Dominant Tenement continued, *inter partes* well after 31 March 2021 and until very recently'. Mr Katjirua states, in part, the following in his answering affidavit at para 58: 'The arrangement has always been that should the applicant need water, the respondents are prepared to supply such water, not on the basis of an existing servitude or an obligation to do so but simply on humanitarian grounds.' I must immediately say that I do not agree with the respondents' stance that there is no obligation on them to supply water to the applicants for the reasons already set out earlier in this judgment and for further reasons below.

[45] First, it is to be noted that I underlined the word 'arrangement' in the immediately preceding paragraph in order to emphasise that both parties used the same word in describing the prevailing relationship between them. I have found that their relationship is nothing else then an option agreement which survived the

demise of the notarial agreement. In order to determine whether the word ‘arrangement’ bears the same meaning as ‘agreement’, resort is to be had to the dictionary meanings of the said word as a tool to ascertain its ordinary meaning. *Oxford Dictionary Thesaurus* defines an arrangement as inter alia; ‘We had an arrangement, agreement, deal, understanding; bargain; settlement; pact, *modus vivendi*’. *Black’s Law Dictionary* defines an ‘arrangement’ as: a measure taken or plan made in advance of some occurrence, sometimes for legal purpose; an agreement or settlement of details made in anticipation.

[46] What I gather from those dictionary meanings is that they all signify ‘an agreement’ existing between parties. To my mind the definition by *Black’s Law Dictionary* fits the facts of the present matter in that the agreement existing between the parties has been made in anticipation of entering into a notarial agreement to be subsequently registered to create a servitude. It follows therefore, in my view that both parties acknowledge that an agreement exists between them albeit they refer to it as an arrangement.

[47] Secondly, it is common cause that the respondents’ legal practitioner recorded in writing to the applicants on 2 June 2021 that the respondents have ‘no intention to refuse living beings from any water’. This appears to create a discord or a contradiction between what was conveyed in writing to the applicants by the respondents’ legal practitioner in a form of a firm undertaking to supply water to the applicants and the stance now adopted by the respondents in their answering affidavit.

[48] The legal position regarding the relationship between a client and his legal practitioner is well-settled. In this respect it was held by the Supreme Court in *Belete Worku v Equity Aviation (Pty) Ltd* at para 27 as follows:

‘[27] The lawyer and client relationship is no more than that of principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority. It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or

her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate. In order to escape liability it would be necessary for the principal to give notice to those who are likely to interact with the agent, *qua* agent, of the limitations imposed by him or her upon the agent's apparent authority.'[9]

[49] In my view, the above principle applies in the present matter. The respondents' legal representative conveyed an equivocal undertaking to the applicants on behalf of the respondents that the respondents have no intention of refusing to supply water to the applicants' animals. In my view, based on that unequivocal undertaking, the respondents cannot be heard to say that they do not have an obligation to supply water to the first applicant. In my view, respondents have an obligation to supply water to the first applicant which obligation has been created on their behalf by their legal practitioner.

[50] Thirdly, it is my considered view that quite apart from my findings above and in merely assessing whether the applicants have established a *prima facie* right by following the well-established approach to this question, on the facts of this matter the applicants should obtain a final relief at the trial. It is trite that the proper approach is to consider the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus the applicant should on those facts obtain final relief at the trial.[10]

[51] In the present matter, the facts set out by the applicants are undisputed by the respondents. The first applicant states that his farm is dependent on the respondents' farm for the water supply. This fact is borne out by the Notarial Deed which was entered into between the parties and which made provision for the supply of water from the respondents' farm to the first applicant's farm for a period of ten years. That agreement further made provision for the applicants to drill boreholes on the respondents' farm to supply water to their farm and to subsequently have such agreement registered in the Deeds office. It is common cause that the two boreholes have already been drilled by the applicants on the respondents' farm. It significant to

[9] *Belete Worku v Equity Aviation (Pty) Ltd* (SA 2/2007) (7 July 2009).
[10] LAWSA Volume 11 para 324 (Green Edition).

note that that agreement did not stipulate the duration of the new agreement. The only reasonable inference to be drawn from the absence of such a stipulation is that it would be for an indefinite period and such inference is not unrealistic given the fact that the applicants' farm is dependent and will in the foreseeable future be dependent on the respondents' farm for the supply of water.

[52] The only allegation put up by the respondents in contradiction of the applicants' version is that there is currently no agreement for the supply of water by the respondents to the first applicant's farm. In my judgement, given the admitted fact by the respondents that the first applicant's farm is dependent on the respondents' farm for the supply of water, the inherent probabilities are overwhelmingly in favour of the applicant's version that there is such an agreement. This conclusion is further strengthened by the fact that the parties are still conducting themselves on the same terms and conditions even in the absence of the water servitude.

[53] For all those reasons and considerations, I have therefore arrived at the conclusion that the first applicant has established not only that he has a mere *prima facie* right but on a proper the application of the law to the facts, the first applicant has established a clear right, entitling him to claim performance from the respondents in the form of supplying water to the first applicant's farm. I turn to consider whether the remainder of the requirements for the granting of an interim relief have been satisfied.

A reasonable apprehension of irreparable harm

[54] The applicants case is that if the water supply to first applicant's farm is stopped or interrupted the 193 cattle will suffer and ultimately die leaving the applicants with only a faint, if not impossible claim for damages. This allegation is not denied by the respondents. It is thus considered as proven.

The absence of an adequate alternative relief

[55] In this regard, the applicants point out that the alternative remedy should be effective or suitable. Furthermore, that in the assessment of this requirement, an applicant should never be compelled to part with his or her rights. It is further submitted that a claim for damages would be feasible. This requirement is interwoven with the court's exercise of its general discretion which is in turn coupled to the requirement of the balance of convenience with which I deal with immediately below.

The balance of convenience

[56] In view of my finding that the applicants have established a clear right, there is less need for the applicants to establish that the balance of convenience favours them. In any event in weighing the prejudice the applicants will suffer if the interim relief sought is not granted against the prejudice the respondents will suffer if the interim relief sought is granted, I am of the view that the prejudice the applicant will suffer far outweighs the prejudice, if any, the respondents will suffer.

Conclusion

[57] Having considered all the facts and circumstances and taking into account the parties respective cases, and in the exercise of its discretion, the court is satisfied that the applicants have made out a case for the relief sought. On account of the foregoing findings and conclusions, it is unnecessary for me to consider the cause of action based on spoliation.

Order

[58] In the result, I make the following order:

1. The applicants' non-compliance with the Rules of this Court, if any, relating to the form and service and time limits as set out in rule 73(3) of the Rules of this Court, are dispensed with and the matter is heard as one of urgency.

2. The respondents are interdicted and restrained from interrupting or interfering with, hindering or obstructing in anyway whatsoever the water supply (i) from the respondents' farm being the remainder of Portion 3 (La Rochelle) of Farm No. 444 situated in the Registration Division "L", Omaheke Region to (ii) the first applicant's farm, being Portion 4 (a Portion of Portion 3) of Farm No. 444 situated in the Registration Division "L", Omaheke Region, and (iii) which water supply was previously the subject of Notarial Deed No. K92/2011S, pending the final determination of case number HC-MD-CIV-ACT-OTH-2021/02392 pending before this court.

3. The respondents, who opposed this application, are to pay the applicants costs, jointly and severally the one paying the other to be absolved, including the costs occasioned by the employment of one instructing counsel and one instructed counsel.

4. The matter is removed from the roll and is considered finalised.

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H Angula

Deputy Judge-President

APPEARANCES:

APPLICANTS:	C E VAN DER WESTHUIZEN Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
RESPONDENTS:	E NEKWAYA Instructed by Pack Law Chambers, Windhoek