IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO:	**338/22**
DATE HEARD:	**27 MAY 2022**
DATE OF ORDER:	**12 AUGUST 2022**

In the matter between:

SAUNDERSON, JAN HENDRIK GERHARDUS Applicant/Defendant *a quo*

And

BOEGOEBERG WATER USERS ASSOCIATION Respondent/Plaintiff *a quo*

Coram: Nxumalo J

REASONS FOR JUDGMENT

Per: **Nxumalo J**

INTRODUCTION:

1. The applicant in these proceedings, a farmer residing and farming in Upington, Northern Cape, on 26 April 2022, lodged an urgent interim mandatory interdict seeking to compel the respondent to fully restore water supply to several of his farming properties. The applicant also sought the respondent to bear the costs of the motion on an attorney and client scale; and further and/or alternative relief. The motion was set-down for hearing on 29 April 2022, at 14h00.

2. Of significance is that at the time this motion was lodged, the respondent had already shut down the water supply to the applicant's properties since 21 April 2022. The interim interdict sought was therefore contemplated to remain extant, pending the final determination of the main action, pending between the parties. The said action relates to certain monies alleged owing to the respondent by the applicant for the supply of certain volumes of water to the latter's properties, as part of his farming activities.

3. The respondent, for its own part, is a water users' association, a body corporate with the powers of a natural person of full capacity *mutatis mutandis*, as contemplated in Section 94 of the **NATIONAL WATER ACT** 36 of 1998,[1] unless same are inconsistent with the Act. It is also significant to point out at the outset that Schedule 4 (excluding item 4(3) of Part 1 thereof) applies to the respondent as if it were an institution and a member of its management committee were a director within the meaning of that Schedule, except to the extent that the responsible Minister may otherwise direct.

BRIEF STATEMENT OF THE RELEVANT BACKGROUND FACTS:

4. The chronology of some salient events is of some relevance here. On or about 08 March 2022, the respondent issued a letter of demand for payment of certain amounts by the applicant for the water allegedly supplied to him, to be paid within 7 days of receipt thereof; failing which, the respondent would terminate the supply of the said water to certain of the applicant's properties, respectively. The applicant denied liability and never obliged.

5. Soon thereafter, the respondent instituted civil proceedings against the applicant on or about 14 March 2022, in terms whereof the former claimed the disputed amounts. The applicant is resisting this claim and denies that he owes the respondent the impugned monies. To this extent, the applicant has entered appearance.

[1] Hereinafter referred to as "***the Act***"

6. According to the applicant, the disputed amounts arise from the respondent unilaterally and without any legal basis adding an impugned amount allegedly owed by the previous owner for water previously supplied to the said properties, onto and carrying same over onto his account, as the current owner. This notwithstanding that when the disputed amount was allegedly incurred, he was neither the owner of any of the affected properties nor did he receive or utilise any water from the respondent.

7. The applicant maintained that he is not liable for the impugned amount and that the respondent could not unlawfully take the law into its own hands and close the sluices that provided the much need and essential irrigation water to his farming properties. That, notwithstanding his numerous protestations in this regard, the respondent persisted to keep the disputed amount on his account, plus interest thereon, in the amount of R864 884.09, which later increased to R983 695.09.

8. Thereafter, on or about 22 March 2022, the respondent issued another letter of demand on more or less the same terms as the one dated 08 March 2022, which was subsequently responded to by the applicant.[2] The foregoing notwithstanding, on or about 21 April 2022, the respondent proceeded to shut down his water supply, by affixing padlocks on the sluice which provide his farming properties with water. Thus his attorney immediately thereafter, and in writing, requested the respondent to remove the said locks on or before close of business on <u>22 April 2022</u>, to no avail.[3] Nor was the said letter responded to by the respondent. It is against this backdrop that this application was lodged.

9. On 29 April 2022, having heard counsel for both parties and having read the documents filed of record, this Court ordered as follows; that: the matter be postponed to 27 May 2022; the respondent were to restore, in full, the water supply to the relevant property of the applicant, pending the finalisation of the

---

[2] Annexure JHGS6 and 7, pp56-57, FA
[3] Annexure JHGS9, ***ibid***

matter;[4] the respondent were to file its supplementary opposing affidavits on or before 06 May 2022; the applicant were to file its replying affidavit on or before 13 May 2022; the applicant were to file its heads of argument on 23 May 2022 and the respondent on 25 May 2022; and the costs of the hearing of the matter on 29 April 2022, were to stand over for adjudication at the final hearing of the matter.[5]

10. Meanwhile, on 17 May 2022, the respondent delivered a notice indicating that it was opposed to the main claim being referred to mediation for *inter alia*, the following reasons; to *wit*: At that stage, as alluded above, even though the applicant had not yet pleaded to the plaintiff's claim, he persisted in his denial of liability for the impugned amounts. That the issue in contention was most likely to be the interpretation of Section 60 of the Act and the constitutionality thereof. That in light of the respondent's claim in the pending action and the applicant's stance in that regard, there existed no prospects that the parties could reach any settlement through the process of mediation.[6]

11. The respondent subsequently delivered a brief answering affidavit, on or about 29 April 2022. On 06 May 2022, the respondent delivered its supplementary affidavit. Of significance is that both affidavits are deposed to by one Mr Jean Lombard, the executive officer of the respondent. The applicant, for its own part, delivered its replying affidavit on 16 May 2022.

PRELIMINARY POINTS:

12. In paragraph 26 of his founding affidavit the applicant took issue with the fact that the respondent has failed to provide any authorisation or delegation for the conduct of Mr PM Kotze, who is both the chairperson of the respondent and the author of the impugned "pre-directive notices."

[4] i.e. the urgent application
[5] i.e. 27 May 2022
[6] p112-115, Urgent Application, Vol 2

13. This Court is of the opinion that this point is not legally sound and therefore fell to be dismissed for the following reasons. It can be deduced from the facts and circumstances of this case that Mr Kotze, as chairperson of the respondent, was held out by the respondent to be authorised to act as he did at all material time hereto. It is so since in our law, the presence of ostensible authority is established if it is shown that the principal created an appearance that the agent had the power to act on the principal's behalf. Nothing more is required.[7] Mr Kotze's authority may also be inferred from the fact that he was acting in his capacity as the incumbent chairperson of the respondent, at all material times hereto.[8]

14. The applicant also quibbled with the fact that the deponent to the respondent's affidavits, one Mr Jean Lombard, who is its chief executive officer (CEO) did not attach any authorisation evincing his mandate to depose to the said affidavits. In the premise, the applicant denied that the said deponent had any rightful authority to depose to the said affidavits.

15. In this Court's opinion, the foregoing contention is not only completely misplaced but also unduly technical. It is so for at least the following trite reasons. If an attorney acting for a party is authorised to act, there is no need for any other person, whether he be a witness or someone who becomes involved, to be additionally authorised.[9] In our law, a deponent to an affidavit need not be authorised by the party concerned to depose thereto. It is the institution of the proceedings and the prosecution thereof which must be authorised.[10] The bottom line is, anyone who can lawfully be a witness in a matter, may execute an affidavit pertaining to that matter. In any event, as correctly pointed out by the respondent, the applicant did not invoke rule 7 of the Uniform Rules.[11] In the premise, this point *in limine* also fell to be dismissed.

---

[7] **Makate v Vodacom** 2016 (4) SA 121 (CC)
[8] **Inter-Continental Fin and Leasing Corp v Stands 56 and 57** 1979 (3) SA 740 (W)
[9] **Eskom v Soweto City Council** 1992 (2) SA 703 (W) at 705E
[10] **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA) at 624G-H
[11] **Unlawful Occupiers School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) at 205J-207G

16. The respondent, for its own part, contented preliminarily that the application was not urgent. As alluded above, the applicant lodged these proceedings on 26 April 2022, and set it down for hearing on 29 April 2022, at 14h00. It is common cause that at the time this motion was lodged, the respondent had already shut down the water supply to the applicant's properties since 21 April 2022. The interim interdict sought was therefore contemplated to remain extant, pending the final determination of the main action, pending between the parties.

17. The respondent, in the main complained of what it referred to as *"Inappropriate short notice and inadequate time it was given to [deliver] a fully ventilated opposition."* The nub of the respondent's complaint in this regard was that it was served the urgent motion on Tuesday 26 April 2022 at 14h05. It was contemporaneously directed to enter appearance the same day and to file its answering affidavit before 14h00 on Thursday 28 April 2022, approximately less than 48 hours, after the delivery of the said motion.

18. It is against this backdrop that the respondent contended that it did not have enough time to fully consult with all the interested parties or to obtain crucial information as well as substantiating documentation, pertaining to this matter. For these reasons, according to the respondent, it could not answer the allegations contained in the founding affidavit seriatim.

19. In the premises, the respondent maintained that the application was not urgent, and therefore fell to be struck from the roll with costs. In the alternative, the respondent implored this Court to be granted a postponement for it to fully answer the applicant's motion *vide* a supplementary answering affidavit, in the event that the application is not struck.

20. It is common cause that at the time of the final hearing of this motion, the applicant's water supply had been restored by agreement between the parties, which was thereupon made an order of this Court. The motion was subsequently postponed to cure any prejudice any party may suffer, as a result of any non-compliance with the Uniform Rules.

21. As to the reasons for urgency, the applicant contended that same is conterminous to the irreparable harm traversed in paragraph 29 of his affidavit. That without the impugned water supply, he cannot conduct his farming activities, which in turn would result in him suffering irreparable financial harm. He maintained he will suffer irreparable harm and ultimately "*financial demise*" of his farming enterprise, with the accompanying job losses of his employees and financial hardship for their extended families, if his water usage is not restored with immediate effect. In the premise, he contended that the motion was urgent.

22. It is clear from the foregoing that the applicant predicated the urgency of this matter against the fact that without water supply, it was impossible to conduct his farming activities on his farms. That the said state of affairs will lead to his and his employees' financial ruin. It is so that urgency of commercial interests may justify the invocation of rule 6(12) no less than any other interests.[12] In the premise, this Court found that, despite the postponement, the motion remained urgent enough to justify it being heard out of turn, notwithstanding that same had to be postponed.

THE PARTIES' SUBSTANTIVE ARGUMENTS, IN SUM:

The Applicant's:

23. The applicant in sum argued as follows. That he has a *bona fide* defence to the impugned claim in the main action for the following reasons. The respondent has failed to indicate on which basis does it provide him with water. Whether or not it is in terms of a verbal agreement or not. It has also failed to state why it is able to supply water to him. The respondent has further failed to provide him with a sufficient 90-day notice in terms whereof he was entitled to petition, if the bill was erroneous and if this remains so, he was entitled to exercise his rights to an appeal to the Water Tribunal in terms of the Act.

[12] **Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd** 1982 (3) SA 582 (W) at 586G

24. That the respondent failed to plead on which legal basis he, the applicant, will be liable for the disputed amounts as most is interest on the capital of the disputed amount that was due by the previous owner. The respondent is obliged, but failed to render a special account as to how much water was supplied, to which property and for what period. That at least an amount in excess of R500 000.00, of the amount claimed has prescribed already, as more than 3 years have passed since the debt was incurred. Nowhere in the amount of more or less R590 000.00, reflected, which amount was paid by him during his time as owner nor is there an amount for the provision of water in the summons.

25. That the respondent's conduct, after the main action was already instituted; appearance entered; a notice of bar served as well as rules 30 and 30A notices were delivered; boiled down to *parate executie,* which is clearly unlawful.[13] In the aforementioned, the respondent took the law into its own hands and executed without a legal basis to do so. That in terms of the respondent's constitution, as well as the Act, the respondent had to make an election of instituting action or shutting down the water supply, the latter of which he contends that the respondent does not possess the necessary authority in terms of the Act to do so.

26. According to the applicant, the respondent was furthermore only entitled to shut down the said water supply if certain procedures were followed, which was clearly not the case herein. Alternatively, it was contended for the applicant, that to the extent that he was in free and unhindered possession and use of the impugned water supply, the unilateral conduct of the respondent of terminating the said water supply, notwithstanding his prior warnings not to do so, constitutes nothing more than spoliation.

27. That it is clear that he had a *bona fide* defence in this matter and that the respondent acted *mala fide* in the attempt to take the law into its own hands

[13] A *"parate executie"* clause generically seeks to entitle a secured creditor to dispose of the hypothecated property through private sale without going through the normal Court process, when the debtor defaults on payment obligations under the loan or some other agreement.

without any legal grounds to do so; alternatively despoiled him in his possession and supply of the impugned water.

28. As far as the issue pertaining to irreparable harm is concerned, the applicant *inter alia* contended as follows. That his properties are provided with water by the respondent, without which his farming activities could not proceed. That he would suffer irreparable harm were he not able to water his crops urgently as well as ultimately lead to the demise of his farming activities. That apart from the irreparable damages that he would suffer, same would ultimately lead to the financial demise of his farming activities and subsequent catastrophic job losses and financial hardship of his employees and their extended families. In the premise, the applicant also maintained that he had a *prima facie* right to be granted the relief sought.

29. The applicant also contended that he had no other satisfactory remedy, regard being had to the facts and circumstances of this matter. In this regard, he averred *inter alia*; as follows. That the respondent at no time provided him with the opportunity or was not interested in his oral or written explanation as to why he was not indebted to it in the amount claimed from him. That the respondent had due knowledge of the fact that he disputed the amounts claimed on the invoices since January 2018 and that he has lodged disputes with the respondent repeatedly.

30. That it was clear from the inquiries lodged by him that the impugned amounts remained in dispute at all material times hereto. The foregoing notwithstanding, the respondent still proceeded in terminating the impugned water supply to his properties and his requests and disputations were simply ignored by the respondent throughout. That the constitution of the respondent determines the following in clause 18.5 thereof, loosely translated to English:

"If any charge, including interest, owed to the Association is more than 90 days overdue after due notice, the Management Committee, in addition to the powers vested in it under Section 59(3) of the Act, may, without any further notice, also collect due amount by (a) issuing summons in a magistrate's Court having jurisdiction; (b) stop

water supply, regardless of the amount involved, in which case the member will be liable for all collections and legal costs, including attorney and client costs."[14]

31. That it is further clear that the employment of the word "or" in Section 53 of the Act, clearly indicates that the respondent must make a choice of either carrying out certain works or apply to a competent Court for an appropriate relief. That to the extent that the respondent has made an election by issuing summons in the matter and on this basis alone, the respondent is prohibited from suspending the applicant's use of water. That in the premise, the applicant had a reasonable defence to the applicant's claim as averred in the founding papers.

32. Relying on the minority judgment *per* Heher JA, in **Lourens NO & Others v Impala Water Users Association**,[15] that the respondent still has to prove that the applicant is liable to pay the impugned amount before Section 59 can be invoked, as was determined in both **Lourens v Impala (*supra*)** and **Impala Water Users Association v Lourens No & Others**[16] matters. The applicant also relied on the *dictum* in **Jordaan and Others v Tshwane Metropolitan Municipality and Others**, to contend that a new owner is not liable for the historic debt of a previous owner.[17]

The Respondent's:

33. The respondent, for its own part, submitted and contended as follows. The provisions of Section 53(2) of the Act, are clearly not intended to deal with financial issues or with steps that could be taken in respect of outstanding charges. That the said provisions are clearly intended to deal with cases

---

[14] *"Indien enige vordering, insluitend rente, verskuldig aan die Vereniging meer as 90 dae agterstallig is na behoorlike kennisgewing, kan die Bestuurskomitee, benewens die bevoegdhede wat ingevolge Artikel 59(3) van die Wet aan hom berus, sonder enige verdere kennisgewing, ook die verskuldigde bedrag in te vorder deur (a) dagvaarding uit te reik in 'n Landdroshof wat jurisdiksie het;(b) watertoevoer staak, ongeag die bedrag betrokke, in welke geval die lid aanspreeklik sal wees vir alle invorderings en regskostes, insluitend prokureurs- en kliënt koste."*

[15] [2006] JOL 17550 (SCA).

[16] [2004] JOL 12564(SCA).

[17] 2017 ZACC 31; 2017 (6) SA 287 (CC)

where the conditions of licence or authorisation were contravened and where certain remedial action was not taken, as directed in terms of Section 53(1) of the Act.

34. That it is not in dispute that the respondent is entitled to recover the impugned water charges. That it is so because Section 58 of the Act, enjoins it to do so without restriction or limitation with regard to the remedies it may invoke to do so. Section 59(3) of the Act, expressly and clearly provides for the restriction or suspension of water supply, without suggesting that it would only be permissible, where no summons have been issued.

35. That it is so since Section 59(3) of the Act, expressly provides for such restriction or suspension "*until the charges together with interest have been paid*" means that the respondent, in the meantime is entitled to payment, which in turn implies that it would, notwithstanding the restriction or suspension of water supply, be entitled to enforce its claim of payment.

36. In so far as the provisions of clause 18.5 of the respondent's constitution may purport to restrict the respondent to elect either to issue summons or to suspend the supply of water, same is invalid to the extent of its inconsistency with the provisions of the Act. That it is so since clause 2 of the respondent's constitution expressly provides that its provisions are subject to the Act. The applicant's interpretation of Sections 53 and 59 of the Act, would lead to absurd results.[18] That it is so since it would mean that, if summons is issued to enforce payment of a perfectly valid debt, the water user would continuously be entitled to its normal water supply, at the very least, for as long as the litigation continued.

37. If the respondent is denied the power to suspension or restriction of water supply of a defaulting water user, it would deprive the association of the right to enforce payment of the debt, thus it would mean that the respondent would be deprived of payment of a valid debt and the defaulting water user would

[18] **Ngwenyama v Mayelane and Another** 2012 (3) All SA 408(SCA)

get off scot-free. That the applicant's reliance on the minority judgment of Heher JA in **Lourens v Impala** and on **Impala v Lourens** *(supra)*, is misdirected.

38. That it is clear from the majority judgment in **Lourens** that the right to suspend or restrict water supply provided for in Section 59(3) of the Act, is also available in cases where the existence of the amount or the liability for the payment of a water charge is disputed, as long as the applicant is first given the opportunity of making representations to the respondent as to why the debt is not payable and/or why the suspension or restriction of the water supply would be unfair in the particular circumstances.

39. That in any event, the applicant has admitted being indebted to the respondent when he was afforded a final opportunity on 24 March 2022, to make representations. As early as June 2018, the applicant made an undertaking to settle the outstanding water charges by the end of April 2019. The foregoing constituted an implied admission that the applicant was liable for the payment of the outstanding water charges on his property.

40. That the same applies as far as the applicant's offer of 25 September 2019 and the applicant's instructions that the outstanding water charges be paid from the proceeds of the sale of the property, are concerned. The bare denial of the foregoing in the replying affidavit, does not constitute a proper challenge or a genuine factual dispute.

41. That in paragraph 13 of the letter by the attorney of the applicant dated 16 March 2022, the applicant admitted that when he acquired the property from his brother and predecessor-in-title, Mr PK Saunderson, an amount of R364 112.69, was outstanding in respect of water charges pertaining to the said properties. In any event, it is clear that the outstanding amounts do not consist of only the water charges of the applicant's predecessor, but also those incurred by him.

42. The applicant's reliance on the provisions of clause 18.2 of the respondent's constitution is misplaced. In fact, the said provisions, like Section 60(1) of the Act, make it clear that water charges can be recovered from subsequent owners of a property. Clause 10.1 of the respondent's constitution, for its own part, also recognises the respondent's right to claim payment from a subsequent owner of property, in terms of Section 60 of the Act.

43. The applicant was given two warnings with regard to the imminent suspension of the impugned water supply on 08 and 24 March 2022, which did not elicit payment of any amount at all. That there is absolutely no merit in the applicant's contention that the water charges incurred by his predecessor has prescribed because water charges do not constitute a debt under the Prescription Act 68 of 1969.[19] That in any event, this point was not pertinently raised in the founding affidavit.

44. That in light of the foregoing, the respondent at all material times hereto, acted lawfully in suspending the applicant's water supply. That the applicant has failed to make its case based on spoliation. That in the circumstances, the applicant has failed to show that it has any right, *prima facie* or otherwise, to an uninterrupted supply of the impugned water.

DETERMINATION:

45. In the nature of interim interdicts, the requisites for the right to claim same are; to *wit*: a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy.[20]

---

[19] **Minister of Water and Sanitation v Amathole District Municipality** 2021 (4) SA 252 (ECG).

[20] **Moredubi and others v Barker and others** *[2022] JOL 54788 (GP)*.para 10; **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another** 1973 (3) SA 685 (A); **Knox D'Arcy Ltd and others v Jamieson and others** 1996 (4) SA 348 (A) at 361

46. It is so that the jurisprudential basis of an interim interdict is to preserve or restore a *status quo*, pending the final determination of the rights of parties. It is also so that an interim interdict does not determine these rights, nor does it affect their final determination.[21] It is further so, in our law, that the important factors taken into consideration as far as interim interdicts are concerned are the relative strengths of the parties' respective cases[22] and whether any other remedy is available.[23]

47. It is however trite that our Courts have always retained wide discretionary powers to refuse interim interdicts, even if the requisites have been met. This has been held to mean that our Courts are obliged to have regard to a number of disparate and incommensurable features in coming to decisions, because they do not have free and unfettered discretionary powers. Contrariwise, it is also trite that our Courts have no discretionary powers whatsoever to grant any interim interdict if the requirements have not been met.

Whether the suspension of the water entitlement of the applicant was unlawful or amounted to spoliation:

48. The applicant, in the main contended that the respondent took the law into its own hands and executed without a legal basis to do so. He maintained that it is so since the respondent does not possess the necessary authority in terms of the Act to do so. That in terms of the respondent's constitution as well as the Act, the respondent had to make an election of either instituting action against him or shutting down the water supply. That the respondent evidently chose the option to institute an action.

49. The applicant also contended, without conceding, that even if the respondent was entitled to shut down the water supply, it could only do so after following certain procedures which clearly were not followed in this case. Alternatively,

---

[21] **Apleni v Minister of Law and Order** 1989 (1) SA 195 (AD) at 201
[22] **Beecham Group Ltd v B-M Group (Pty) Ltd** 1977 (1) SA 50 (T) at 55
[23] **Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord-Transvaal** 1970 (4) SA 350 (T), at 367G-368E

so the applicant argued, to the extent that at all material times hereto, he was *"…in free and unhindered possession and use"* of the impugned water supply, the unilateral conduct of the respondent of terminating same, constituted spoliation.

50. The respondent, for its own part, submitted as follows. That the suspension of the water entitlement of the applicant is lawful, regard being had to the provisions of Sections 53; 54; 59(3) and 60 of the Act, read together. That it is common cause that the applicant has been farming on the said land or has owned same since at least 2015; regard being had to annexure JL1 to the founding affidavit. It was also contended for the respondent that to the extent that the applicant was aware of the outstanding impugned amounts when he purchased the properties in question, he accepted that he would become liable for the payment of same should the former owner fail to do so.

51. That in terms of Section 60(1) of the Act, any charge in terms of Section 57(1) of the Act, is a charge on the land and is thus recoverable from the incumbent owner of the land.

52. It is so that in terms of Section 57(1) of the Act, water use charges may be made within a specific water management area; or on a national or regional basis; and must be made in accordance with the pricing strategy for water use charges set by the Minister or a relevant *"responsible authority"* within the contemplation of Section 1 of the Act.[24] It is common cause that the respondent is a "water management institution"[25] and therefore the relevant *"responsible authority"* within the contemplation of the Act.[26] It is so that

---

[24] A "**responsible authority**" in relation to a specific power or duty in respect of water uses, means-
(a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or
(b) if that power or duty has not been assigned, the Minister.

[25] Section 1 of the Act defines the expression ***"water management institution"*** as:
'a catchment management agency, a water association, a body responsible for international water management or any person who fulfils the functions of a water management institution in terms of this Act.'

[26] In terms of Section 1 of the Act, a ***"responsible authority"*** in relation to specific power or duty in respect of water uses, means-
(a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency; or
(b) if that power or duty has not been so assigned, the Minister.

charges made within a specific water management area may be made by and are payable to the relevant water management institution and that the respondent is such an institution; regard being had to Section 57(2) of the Act.[27]

53. Section 59(2) of the Act, for its own part, contemporaneously requires any person registered in terms of a regulation under Section 26 of the Act; or holding a license to use water, to pay all charges imposed under Section 57 of the Act, in respect of that water use. The applicant is such a person. It is so that if water use charge is not paid, interest is payable during the period of default at a rate determined from time to time by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette; regard being had to Section 59(2) and (3) of the Act. It is also so that Section 59(3)(b) of the Act, contemporaneously empowers the respondent to restrict or suspend the supply of water to the applicant until he has paid the impugned charges, together with interest, thereon.

54. A claim to relief under the *mandament van spolie*, arises solely from deprivation of possession otherwise than through legal procedure. Our law stipulates, if reliance is placed on an illegality flowing from the provision of a statute, reference to the provision must be made in the relevant pleading; or the pleading must be so formulated that it is sufficiently clear on which statutory provision reliance is placed. It was therefore incumbent on the applicant in these proceedings not only to allege but prove being unlawfully deprived of the right to the supply of water by the respondent. In this context, it is settled law that "unlawful" does not only denote dispossession without the applicant's consent but also without legal process.[28]

55. This Court is of the opinion that the election referred to by the applicant in Section 53(2) of the Act, contextually and purposively only pertains to "*rectification of contraventions*" pertaining to licensees' failure to take remedial

---

[27] "May" contextually means "must"

[28] **George Municipality v Vena and Another** 1989 (2) SA 263(A)

action within the time specified in the notice, or any longer time allowed, the responsible authority may thereafter "*carry out any works and take any other action necessary to rectify the contraventions and recover its reasonable costs from the person on whom the notice was served or apply to a competent Court for appropriate relief*" other than the failure to pay for water use charges to which the land relates, as contemplated in Section 59 Section of the Act.

56. Section 59(2) of the Act, which is aptly headed "*Liability for Water Use Charges*" expressly and unambiguously obligates any person registered in terms of regulation 26 or holding a licence to use water to pay all charges imposed under Section 57, in respect of that water use. Section 58(3) of the Act, which renders the respondent and the applicant jointly and severally liable to the state for water use charges, expressly empowers the respondent to recover same from the applicant.

57. Section 59(3)(b), for its own part, expressly empowers the respondent, if a water use charge is not paid to restrict or suspend the supply of water to the applicant until the charges, together with interest, have been paid. This is permissible, after a water user has been given an opportunity to make representations within a reasonable period on any proposed restriction or suspension before same is imposed.

58. It is clear from the foregoing that regard being had to the facts and circumstances of this case, the respondent at all material times hereto had the statutory right to dispossess the applicant, upon the latter's failure to defray the overdue water use charges and interest due thereon. It is also clear that the applicant was given sufficient opportunities to make representations within reasonable periods before the impugned suspension of water was imposed, as contemplated in Section 59(4) of the Act. This Court thus found that the respondent has correctly invoked the relevant statutory provisions and that same has occurred strictly within the limits of the Act.[29]

[29] **Ngqukumba v Minister of Safety and Security** 2014 (5) SA 112 (CC)

59. The applicant avers without more that the respondent failed to follow *"certain procedures which clearly were not followed in this case."* It is so in our law that a person relying on illegality must not only plead it, but that express reference to the relevant provisions must be made, if reliance is placed on an illegality allegedly flowing from a provision of a statute. In other words, the pleading must be so formulated that it is sufficiently clear on which statutory provision reliance is placed. None of the foregoing in law or in fact appear *ex facie* the applicant's pleadings. Significantly, liability for water use charges is not mentioned in Section 148 of the Act, which regulates appeals to the Water Tribunal.

60. In the premise, this Court was constrained to find that to the extent that the applicant has not paid the impugned water use charges and interest thereon, the suspension of the water entitlement of the applicant was lawful.

Whether the respondent's conduct constitutes *"parate executie"* or has made an election in terms of Section 53 of the Act:

61. The applicant contended that the respondent's conduct, after the main action was already instituted; appearance entered; a notice of bar served as well as rules 30 and 30A notices were delivered; boils down to *parate executie,* which is clearly unlawful.[30] The applicant also contended that, notwithstanding the various correspondence between the parties and the fact that the respondent already made an election in terms of Section 53 of the Act and clause 18.5 of its own constitution to institute action, the respondent unilaterally and unlawfully terminated his use of water.

62. The respondent, for its own part simply denied that its conduct constituted *parate executie* because at all material times hereto, it has acted in terms of the Act and specifically Section 60, thereof. Section 60(1) of the Act, expressly

[30] A *"parate executie"* clause generically seeks to entitle a secured creditor to dispose of the hypothecated property through private sale without going through the normal Court process, when the debtor defaults on payment obligations under the loan or some other agreement

and unambiguously attributes water charges on the land and the incumbent owner thereof, thus:

> *"60 **Water use charges are charges on land-***
>
> *(1) a charge made in terms of Section 57(1), including any interest, **is a charge on land to which the water use relates and is recoverable from the current owner of the land** without releasing any person who may be liable for the charge."*[31]

63. It is clear from the foregoing that whether the disputed amount was allegedly incurred when the applicant was neither the owner of any of the impugned properties, or did not receive or utilise any water from the respondent at the relevant period, is immaterial. The heart of the matter is that as matters stand, the charges made in terms of Section 57(1), including any interest, are a charge on land to which the water use relates and is recoverable from the current owner of the land.

64. This Court agreed with the respondent's contention that **Jordaan v Tshwane Metropolitan** *(supra)*, is distinguishable from the present case. It is so since distinguishably, **Jordaan** indeed concerns charges for "municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties", within the contemplation of Section 118(3) of the **MUNICIPAL SYSTEMS ACT** 32 of 2000. **Jordaan** does not apply to water charges under Section 57(1) of the Act. Reliance on the said case was ill-advised and legally astray.

65. This Court, therefore, agreed with the respondent also for the following reasons. A *"parate executie"* clause generically seeks to entitle a secured creditor to dispose of the hypothecated property through private sale without going through the normal Court process, when the debtor defaults on payment obligations under the loan or some other agreement. Section 53 of the Act does not only authorise the disposal of any hypothecated property through

[31] Emphasis supplied

private sale without going through the normal Court process, it is also irrelevant in these proceedings.

66. It is so because the said Section's application is limited to the *"rectification of contraventions"* generically and not *"liability for water use charges"* specifically as contemplated in Section 59 of the Act. As alluded to above, Section 59(3)(b) of the Act, expressly and unambiguously empowers the respondent to restrict or suspend the supply of water to a water user from a waterworks or the authorisation to use water thereof, until the user has paid the impugned charges, together with interest, thereon. This is evinced by the fact that Section 59(3)(b) of the Act squarely falls within the purview of Part 10 of Chapter 4 of the Act, which expressly and generally regulates *"contraventions of or failure to comply with authorisations"* (ss 53-55); as opposed to Part 1 of Chapter 5 of the Act (ss56-60) which specifically regulates *"water use charges"*

67. The former expressly and unambiguously stipulates as follows in its pre-amble:

> *"This Part deals with the consequences of contraventions of licence conditions.* ***These range from the responsible authority requiring the licensee to take remedial action, failing which it may take the necessary action and recover reasonable costs from that person, to the suspension or withdrawal of a licence*** *…."*[32]

68. The latter for its own part *inter alia* stipulates as follows, in its pre-amble:

> ***"…*** *Water use charges are to be used to fund the direct and related costs of water resource management, development and use, and may also be used to achieve an equitable and efficient allocation of water. In addition, they may also be used to ensure with prescribed standards and* ***water management practices according to user pays and polluter pays principles…Non-payment of water use charges will attract***

[32] Emphasis supplied.

penalties, including the possible restriction or suspension of water supply from a waterworks or an authorisation to use water."[33]

69. An election generally involves a waiver. It only occurs where one right is waived by a party electing to exercise another right which is inconsistent with the other. As alluded above, the provisions of Part 10 of Chapter 4 and Part 1 of Chapter 5, are not mutually exclusive, they are compassable. The invocation of one therefore cannot connote the revocation of another.[34]

70. Of significance is that there is no general proposition in our law that a party with more than one remedy at its disposal must elect at some given point which one to pursue and that having done so, that party is assumed to have abandoned all other remedies. The position would have been different if the above mentioned remedies were inconsistent.[35]

71. Of significance also is that to the extent that the duty of the respondent to recover payment from individual water users is in the public interest and not for its private benefit, it cannot be renounced or waived by it. It is so since it is impermissible in our law to do so. In our law, no one may renounce a right contrary to law or right introduced in the public interest and not only for personal benefit.[36]

72. The following can be surmised from both of the respondent's affidavits; to *wit*:

"8.1

On or during June 2018 the applicant, however, made an appointment with me. The applicant undertook to repay the total outstanding in monthly repayments of R5 000.00, until the end of March 2019, whereafter he would make a lump sum payment of the total outstanding amount at the end of April 2019. The applicant also acquiesced that in the event that he does not make the payments as agreed

[33] Emphasis supplied

[34] *Xenopoulos and Another v Standard Bank of SA Ltd and Another* 2001 (3) SA 498 (W)

[35] *Thomas v Henry and Another* 1985 (3) SA 889 (A)

[36] *De Jager v ABSA Bank* 2001 (3) SA 537 (SCA)

upon, legal action against him will commence and that his water entitlement will be suspended. *I sent a letter with the applicant's new undertaking to the respondent, which I herewith attach as **"JL2"**.* ***The undertaking by the applicant was formally put in writing and signed on 10 July 2018, which was accepted by the respondent.*** *The applicant again failed to make payments. The undertaking and acknowledgment of debt is attached hereto marked as **"JL3"**.*[37]

8.2

On 25 September 2019 the applicant sent another offer to the respondent, in which offer the applicant advanced that the respondent should stop charging interest so that he can discharge the capital amount only. *I attach the letter as **"JL4"**.*

9

…

10

<u>THE NATIONAL WATER ACT ("the Act"), Act 36 of 1998 AND SPOLIATION</u>

10.1 ***In terms of Section 57(2) of the Act any person registered in terms of a regulation under Section 26 or holding a licence to use water must pay all charges imposed under Section 57 in respect of that water use.***

10.2 *I am advised that spoliation is justified where it is lawful and that the mandament van spolie can only be successful if the applicant can show cause that he was in undisturbed possession.*

10.3 ***On 8 March 2022 the applicant issued a notice in terms of Section 53(1) of the Act. Find attached the notice marked as JL7. In terms of the act the owner can take action to rectify the contravention within a period not shorter that (sic) 2 working days. The respondent afforded the applicant 7 days to rectify the contravention.***[38] ***The applicant's attention*** *was also drawn to Section 54(1), 151(1)(d) and 151(2) of the Act.*[39]

[37] Emphasis supplied.
[38] The respondent at paragraph 2.3, p122, SAA, refers to same as "*pre-directive notices*"
[39] Emphasis supplied

11.

*On **24 March 2022** the respondent issued a second notice to the applicant.*[40] *The only response to these notices was two letters sent from the applicant's attorneys, which tried to raise technical issues.* ***The applicant deliberately refused to follow the remedies as set out in the Act.*** Find attach *(sic)* the letter dated **24 March 2022** and marked as ***JL8***. [41]

12

*It is extremely important to take into account, a point that the applicant conveniently fails to disclose, that despite settlement of the outstanding amount, the applicant's yearly water entitlement fee is R167 626.30. The last payment that the applicant made was in 22 July 2021. A total amount of R1 000 044.11 is owed by the applicant as on 29 April 2022. Find attached the statement as **"JL9"**.* ***The applicant therefore expects the honourable Court to come to his assistance and expects to be allowed to continue drawing benefit from the water supply while he has not even been making the regular six monthly payments due to the respondent.***[42]

13

Section 54(1) clearly stipulates that the respondent may by notice to the applicant who is entitled to use water under this Act suspend or withdraw the entitlement if the applicant fails-

(a) ***to comply with the condition of entitlement;***

(b) ***to comply with this Act; or***

(c) ***to pay a charge which is payable in terms of Chapter 5.***[43]

14

In terms of Section 59(3) of the Act, the respondent is justified to suspend the supply of water to the water user from a waterworks until the charges, together with interest, have been paid. It is therefore submitted that the applicant is not entitled to the relief

[40] Second pre-directive notice

[41] Emphasis supplied

[42] Emphasis supplied

[43] Emphasis supplied

he claims as the suspension of the entitlement is justified. Therefore, the application stands to fail with costs."

73. In reply to the foregoing, the applicant barely denied that he undertook to pay the impugned amount, without more. He contended that the respondent unlawfully and unconstitutionally carried over an amount from the previous owner to his account, which amount together with other amounts have since prescribed, which is to be raised in the pending main action. That he has entered appearance to defend the respondent action, in this regard. That whether or not he owes any amount to the respondent is an issue to be decided in the pending action between the parties.[44] The foregoing is not good enough.

74. In ***Wightman v Headfour (Pty) Ltd and Another*** 2008 (3) SA 371 (SCA), the penultimate Court *per* Heher JA, held *inter alia*; as follows:

> *"[13]* ***A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.*** *There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him.* ***But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied.*** *I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.* ***A litigant may not necessarily recognise or understand the***

[44] Paragraphs 24-28, RA, p147.

nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. *But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit.* ***If that does not happen it should come as no surprise that the Court takes a robust view of the matter.*** *"*[45]

75. In ***Lourens NO & Others v Impala Water Users Association*** [46] Brand JA held for the majority, as follows: *"*

"[50] ***The ambit of our disagreement is delineated by Heher JA's conclusion (in para 43) that '[t]he representation procedure for which s 59(4) provides, must take place after the debt has been admitted or judicially established'.*** *Succinctly stated, my contrary view is that although the requirements of both s 59(3) and 59(4) must be satisfied in order to justify the restriction of a debtor's water supply under s 59(3)(b),* ***I am unable to infer the prescription of an order of proceedings found by Heher JA, – which requires the establishment of both the fact and the amount of the debt prior to the hearing in terms of s 59(4) – in either of the two subsections concerned.***

[51] ***If Heher JA's conclusion is correct, it would mean that the association is compelled to seek a Court order whenever the fact or quantum of the debtor's alleged liability is denied, however spurious or contrived the grounds for such denial may be.*** *As is, with respect, correctly pointed out by Heher JA (in para 39), s 59(3) creates a mechanism of enforcing a debt without the requirement of judicial sanction. On his construction, judicial sanction can, however, only be avoided if the debtor admits liability. In the absence of such admission, the association will be compelled to seek judicial*

[45] Emphasis supplied.
[46] *Ibid*, fn 15

determination of the debt before the jurisdictional prerequisite of a s 59(4) hearing can be satisfied, with the resulting delay and period of grace for the defaulting debtor that it entails.

[52] *As appears from Heher JA's judgment, he arrived at this conclusion of a prescribed order, essentially for two reasons: first, because this was held to be the position by this Court in Impala 1; secondly, on the basis that it follows from the structure and purpose of the provisions of s 59(3) and (4). I respectfully find myself unpersuaded by either of these two considerations. I first deal with the purpose and structure of the provisions of the two subsections.* ***In my view a proper reading of two subsections reveals the following: when a debtor is in the opinion of the association a defaulter in the sense of one who has not paid a water charge lawfully raised, it must allow the debtor to make representations. If those representations do not persuade the association otherwise, it would be entitled to restrict or suspend the water supply.***

[53] *If the debtor admits being in default, no question of seeking the sanction of the Court arises. If the debtor disputes the association's claim, the latter has two courses of action open to it.* ***First, it may proceed to exercise the statutory power under s 59(3), but it must be ready to ward off spoliation proceedings, and to discharge the onus which it will bear in those proceedings to establish both the fact and the amount of the debtor's alleged liability****. Apart from a spoliation order, inability on the part of the association to discharge this onus may, of course, also give rise to a claim against it for the damages resulting from its unlawful action.*

[54] *The alternative and more cautious procedure would be to approach the Court first, either in proceedings seeking an order for payment of the amount claimed, or in proceedings, such as those launched by the respondent in this matter, for an order sanctioning the restriction or suspension of the debtor's water supply under s 59(3). In the exercise of the latter option, the association must be prepared to establish the fact and quantum of the debtor's liability in motion proceedings.*

[55] *In any event, the association would have to afford the debtor the opportunity to make representations in terms of s 59(4) and then to consider those representations before it either decides to restrict the water supply of its own accord, or to seek a Court order to that effect.* ***However, if it decides not to adopt the option of first seeking an order for payment of the amount claimed, there is nothing, in my view, that precludes the association from inviting s 59(4) representations to be made on the supposition, assumption or premise that the amount claimed is due. The invitation would, of course, have to make it clear that the purpose of the proposed hearing is not to establish liability, but to elicit explanation why, on the supposition or premise that liability had been established, the restriction should not be imposed. A debtor who, in the light of this invitation elects not to make representations, but to rely solely on his denial of liability, will do so at his peril.*** *If the association can prove the fact and the amount of his liability, either in spoliation proceedings or in the proceedings seeking authorisation to restrict the debtor's water supply, all the requirements for invoking the statutory powers bestowed upon it by s 59(3) will be met.* ***No consideration derived from a construction of the Act, or of logic, in my view, dictates that a debtor who wrongfully disputes liability should be allowed a period of grace or an opportunity to delay the restriction of his water supply which is denied to a debtor who admits default. This would be the effect of the construction adopted by Heher JA"***[47]

76. It is however also clear from the facts and circumstances of this case that the applicant has not only admitted the impugned debt in writing, but was also afforded a reasonable opportunity to make representations in terms of Section 59(4) of Act as to why the supply of water to his properties should not be restricted or suspended. More, the applicant also seems to have acquiesced that in the event that he does not make the payments as agreed upon, legal action against him will commence and that his water entitlement will be suspended.

[47] Emphasis supplied

Whether the balance of convenience favours the granting of the interim interdict:

77. The applicant submitted that the balance of convenience favours him. That it is so since he would suffer irreparable harm if his water usage was not restored. The respondent, for its own part, maintained that at all material times hereto it has acted in accordance with the Act and denied that the law was taken into its own hands. That in the event that the respondent cannot fulfil its administration and statutory functions, users high up in the irrigation system will use more than their share of water entitlement, which will have the effect that users lower in the irrigation system will not have sufficient water to irrigate their farms. The respondent contended that it has a statutorily delegated duty to make sure that all users in the irrigation system get a fair share of water.

78. The respondent thus contended that the balance of convenience does not favour the applicant. That should the order sought be granted, the respondent will be left in a dire position if the remedies envisaged in terms of Section 60 of the Act are nullified. That the balance of convenience therefore clearly favours it and consequently the water users that it serves and who are keeping up with the payment of their water charges.

79. This Court of course had to weigh the prejudice the applicant will suffer if the interim interdict was not granted against the prejudice the respondent will suffer if it is.[48] The exercise of this discretion required a consideration of the prospects of success and the balance of convenience. The stronger the prospects of success, the less the need for such balance to favour the applicant. Contra wise, the weaker the prospects of success, the greater the need to favour him.[49] This Court is of a view that regard being had to the facts and circumstances of this case, the applicant's prospects of success are

[48] **Glaxo Wellcome (Pty) Ltd and Others v Terblanche NO and Others** *(No 2)* 2001 (4) SA 901 (CAC), at 911
[49] **Olympic Passenger Service (Pty) Ltd v Ramlagan** 1957 (2) SA 382 (D)

weak. In the premise, this Court found that the balance of convenience favours the respondent.

Whether the applicant has a *prima facie* right:

80. The respondent contended that, regard being had to the facts and circumstances of this case and the applicable law, the applicant has failed to evince any right worth protecting in the circumstances. That the applicant would only have had a right if he was not in arrears with his accounts and that he had more than a reasonable time to adhere to the notices sent to him, which he decided not to. That any harm suffered by the applicant is therefore self-inflicted. This Court could not agree more with the respondent.

CONCLUSION:

81. It is so in our law that no discretion vests in a Court to grant any interdict for the protection of an alleged right which is found not to exist.[50] The degree of proving a *prima facie* right has been formulated as follows in our law: 'Whilst a right can be *prima facie* established, even if it is open to some doubt, a mere acceptance of the applicant's allegations is insufficient'.[51]

82. Having considered the facts as set out by the respondent, which the applicant could not dispute; the inherent probabilities and the ultimate *onus* in the action; and the facts as set out in contradiction by the respondent; this Court decided that the applicant has failed to evince any compliance with any antecedents or reciprocal obligation in terms of the Act. This Court therefore concluded that the applicant has failed to evince the existence of any graspable right in substantive law that the respondent is alleged to have infringed. *A fortiori*, the remainder of the requisites for an interim interdict became moot.

---

[50] **Sweets from Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another** 1999 (1) SA 796 (W), at para 11

[51] **Selected Products Ltd v Enterprise Bakeries (Pty) Ltd** 1963 (1) SA 237 (C); **Molefi Thoabala Inc v Mangaung Metropolitan Municipality and others** [2016] JOL 37092 (FB), at para 4

83. It is against this backdrop that this Court found that, regard being had to the facts and circumstances of this case, the respondent has shown that its actions in interfering with the applicant's flow of water fell strictly within the four corners of the Act and that the portion of water charge withheld by it was lawfully owing and payable. Judgment was reserved on 27 May 2022. Thereafter on 12 August 2022, this Court was constrained to grant an order as follows:

ORDER:

(a) The application is dismissed with costs.

[redacted]

JUDGE APS NXUMALO
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

Counsel for the Applicant:	**ADV DC JANKOWITZ**
Instructed by:	**Engelman Magabane Inc.**
	Ref: **Ms JA Snyders**
Counsel for the Respondent:	**ADV JL OLIVIER**
Instructed by:	**Haarhoffs Inc.**
	Ref: **Mr D Pretorius**