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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 40514/2013

Date: 17/4/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

16/4/2015 *[Signature]*
DATE SIGNATURE

In the matter between:

THE TRUSTEES OF THE TIME BEING OF THE
LUCAS SCHEEPERS TRUST, IT 633/96

1ST APPLICANT

THE TRUSTEES OF THE TIME BEING OF THE
JJ SCHEEPERS TRUST

2ND APPLICANT

LUCAS SCHEEPERS N.O.

3RD APPLICANT

MERRY MOLE DEVELOPMENTS N.O. (PTY) LTD

4TH APPLICANT

And

**MEC FOR THE DEPARTMENT OF WATER AFFAIRS,
GAUTENG**

1ST RESPONDENT

**MINISTER OF WATER AFFAIRS AND
ENVIRONMENTAL AFFAIRS**

2ND RESPONDENT

**REGIONAL HEAD FOR THE DEPARTMENT
OF WATER AFFAIRS, GAUTENG**

3RD RESPONDENT

**REGIONAL HEAD FOR THE DEPARTMENT
OF WATER AFFAIRS, BLOEMFONTEIN**

4TH RESPONDENT

**DIRECTOR GENERAL FOR WATER AND
ENVIRONMENTAL AFFAIRS**

5TH RESPONDENT

THE REGISTRAR OF DEEDS (BLOEMFONTEIN)

6TH RESPONDENT

JUDGMENT

PRETORIUS J.

[1] This is an application for an order to declare section 25(1) of the National Water Act 36 of 1998 ("the Act") to be inconsistent with the provisions of sections 24 to 27 (excluding section 26) and section 39 as read with section 195(1)(b) of the Constitution as it fails to give effect to the provisions of the Bill of Rights as read with section 195(1)(b) of the Constitution.

[2] The proposal is that the court proposes that section 25(1) of the Act be amended by the deletion of the words "*irrigation*" and the

substitution therewith of the word "*irrigation or for any purpose*" and the deletion of the words "*for the same or similar purpose*" and the substitution therewith of the words "*for such purpose as the water management institution may determine*".

- [3] An alternative prayer to the above proposal is that the provisions of section 25(1) of the Act be referred to the National Legislature in order for it to rectify section 25(1) of the Act insofar as it is inconsistent with the provisions of the Bill of Rights.

Background:

- [4] The first applicant is the owner of the farm known as Joffre and the remaining Extent, portion 2 of the farm Denver 1285. This application is in relation to the farm Denver and its various subdivisions. The farm Denver is not allowed to use any water for irrigation purposes from the Vaal River/Vaal Dam at present.
- [5] Previously Denver was allowed, in terms of the repealed Water Act 54 of 1956, to use public water drawn from the Vaal River at a rate of 110 litres per second and the quota allowed on Denver was 250 000m³ which could be stored.
- [6] The fourth applicant received a permit to utilize water for industrial purposes. The fourth applicant, the owner of Koppiesfontein, intended to establish a golf course on the property, but has failed to do so. The fourth applicant is entitled to use 2 822m³ water on a 24 hour per day basis, which is 676 216m³ per annum, for industrial purposes. This water is drawn from the Vaal River/Vaal Dam.

[7] The first and second applicants entered into an oral agreement with the fourth applicant where it was agreed that the fourth applicant's entitlement to use industrial water was made available to the first and second applicants for irrigation purposes on the farm Denver. The parties were *ad idem* that the water was suitable for irrigation. The first applicant, with the assistance of the fourth applicant launched an application to the third respondent for the temporary transfer of Koppiesfontein's water use entitlement to Denver in terms of section 25(1) of the Act.

[8] On 30 November 2011 the third respondent declined the application setting out:

"Portion 6 of the farm Koppiesfontein 478 IR has an existing lawful water use of 2822.44m³/24 hr (676.216m³/annum) for industrial purposes obtained in terms of Section 33(4) of the NWA. The NWA makes provision for the temporary transfer of irrigation water use entitlements only"

[9] Section 25(1) provides:

"A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or

similar purpose.”

[10] The dismissal of the applicants' application cannot be faulted as section 25(1) does not provide for water being used for industrial purposes to be used for irrigation. There is presently no water on Denver and the pipes laid over Farm Joffre, which is adjacent to the first applicant's farm, have been closed by the third respondent.

[11] A verification process was undertaken after the National Water Act 36 of 1998 came into operation. The Department required the applicant to apply for verification. The applicant applied in terms of section 35(1) of the Water Act.

[12] The Department studied the application and came to the conclusion that the farm Denver did not have water rights in terms of section 3 of the present Water Act. Section 3 provides:

“3. Public trusteeship of nation's water resources.—(1)

As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) *The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic."*

[13] The applicants chose not to appeal this decision to the Water Tribunal and therefor did not exhaust the internal remedies available before approaching the court.

[14] The Legal Principles:

In **Koyabe v Minister of Home Affairs 2010(4) SA 327 CC at 341** para 35-36 the court found:

"the duty to exhaust internal remedies was a valuable and necessary requirement in our law as internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanism, rectifying irregularities first before aggrieved parties resort to litigation".

And at page 340 para F:

*"unless exceptional circumstances are found to exist by a court on application by an affected person, **PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action**". (Court's emphasis)*

[15] The current application is not a review application although it is based on a decision which the respondents had taken. It was incumbent on the applicants to appeal the decision to the Water

Tribunal and to exhaust the internal remedies before approaching this court.

[16] In the present instance where the first and second applicants aver that they had used water before the promulgation of the present Water Act, the applicants could have applied to have the water use declared as lawful water use as set out in section 35 of the Act. The applicants could have launched an appeal to the Water Tribunal, but failed to do so. The applicants could have appealed against the decision that the water use was not lawful water use prior to the promulgation of the Act. Should they have been unsuccessful in such an appeal, they could have instituted a review application to the court.

[17] The agreement between the first and second applicants and the fourth applicant was not approved by the Department as it is contrary to the peremptory provisions of the Water Act. The applicants concede that section 25(1) of the Act is contrary to the terms of the agreement as section 25(1) relates only to water used for irrigation and not for industrial purposes.

[18] Hence the application by the applicants to have section 25(1) declared inconsistent with the provisions of sections 9, 24, 27 and 39 of the Bill of Rights read with section 195(1)(b) of the Constitution which provides:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

...

(b) efficient, economic and effective use of resources must be performed.”

[19] The respondents aver that the lack of water supply on Denver can be addressed by making use of the provisions of the Act.

[20] Section 40 of the Act provides:

“a person who is required or wishes to obtain a license to use water must apply to the relevant responsible authority for a license and follow the procedure as set out in section 41 of the National Water Act.”

[21] The applicants did not avail themselves of this mechanism to obtain a water license for irrigation on the farm Denver. The applicants' contention is that it would have been an exercise in futility. The applicants could have facilitated their application for a license by requesting the fourth applicant to surrender its unused entitlement to the first and second applicants as envisaged in section 25(2) of the Act. Section 25 (2) of the Act provides:

“(2) A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement—

(a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and

(b) on condition that the surrender only becomes effective if and when such application is granted.”

[22] Although parties can agree that the water entitlement of one user may be used by another farmer on another farm, section 25(2)(b) sets out clearly that where one person surrenders his entitlement for use of water from the same source in respect of other land, it only becomes effective if and when an application is granted. A mere agreement between the parties, as in this instance, does not suffice.

[23] The Department had found that the water use on Denver was not an existing lawful water entitlement, but did not prohibit the applicants to apply for a water license in terms of section 40 of the Act.

[24] This court has to decide whether section 25(1) of the Act is inconsistent with the provisions of sections 9, 24, 27 and 39 of the Bill of Rights. Section 9(1) of the Constitution deals with equality before the law and equal protection and benefit of the law. Section 24 deals with the protection of the environment through legislative and other measures. Section 27 provides that “everyone has the right to have access to ... (b) sufficient food and water”. Section 39 of the Constitution provides:

“39. *Interpretation of Bill of Rights.—(1) When interpreting the Bill of Rights, a court, tribunal or forum—*

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) *may consider foreign law.*

(2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

(3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*

[25] The court has to enquire and decide as to the purpose and effect of section 25(1). The Constitutional Court has decided in **Zondi v MEC for Traditional and Local Government Affairs and others 2005(3) SA 589 CC** where the Constitutional Court held at paragraph 90:

"The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional."

[26] Section 2 of the Act sets out the purpose of the Act as:

"2. Purpose of Act.—The purpose of this Act is to ensure that the nation's water resources are protected,

used, developed, conserved, managed and controlled in ways which take into account amongst other factors—

(a)meeting the basic human needs of present and future generations;

(b)promoting equitable access to water;

(c)redressing the results of past racial and gender discrimination;

(d)promoting the efficient, sustainable and beneficial use of water in the public interest;

(e)facilitating social and economic development;

(f)providing for growing demand for water use;

(g)protecting aquatic and associated ecosystems and their biological diversity;

(h)reducing and preventing pollution and degradation of water resources;

(i)meeting international obligations;

(j)promoting dam safety;

(k)managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.”

[27] Section 25(1) of the Act makes provision that an authorised water user for irrigation purposes may seek permission in terms of section 25(2)(b) to use the water for irrigation purposes

elsewhere. The applicants request the court to declare section 25(1) of the Act inconsistent with section 27 of the Constitution, as section 25(1) only relates to water for irrigation purposes and should, according to the applicants include the words "*and industrial*". This, according to the applicants, would make it possible to use water from an authorized water user, who has been licensed to use water for industrial purposes.

[28] As I interpret the section, it allows a person who has already been authorised to use water for irrigation purposes to use the water at another place for irrigation purposes. This can only take place once the applicants had applied to the Department and the Department has granted such an application.

[29] I find that the applicants had not exhausted their internal remedies by not appealing to the Water Tribunal. Furthermore it was incumbent on the first and second applicants to apply for a water license in terms of section 40 of the Act, which application could have been facilitated by the fourth applicant surrendering his entitlement simultaneously with the first and second applicant's application for a water license. The applicants chose not to do so.

[30] The applicants did not appeal the original decision that the applicants were not lawful water users before the promulgation of the Act.

[31] Counsel for the applicants referred me to the decision of **Atwell Sibusiso Makhanya N.O. and Another v Goede Wellington**

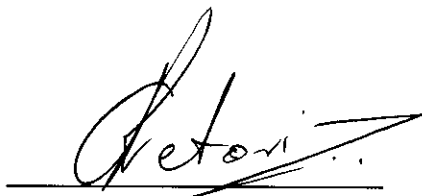
Boerdery, Case 230/2012 SCA, 30 November 2012.

[32] The present application is distinguishable as Atwell dealt with a review and setting aside of the Water Tribunal's decision. In the present matter the applicants refrained from appealing to the Water Tribunal, but launched this application without exhausting the internal remedies as provided in the Act. Furthermore the applicants had not availed themselves in applying for a water license or making use of the provisions of section 25(2)(b) of the Act.

[33] I cannot find that section 25(1) is inconsistent with the provisions of sections 9, 24, 27 and 39 of the Constitution in these circumstances.

[34] Therefor the following order is made:

- 1. The application is dismissed with costs.**



Handwritten signature of Judge C Pretorius, written in black ink over a horizontal line.

Judge C Pretorius

Case number : 40514/2013

Application heard on : 23 March 2015

For the Applicant : Adv. GH Meyer

Instructed by : Rossouws Lesie Inc.

For the Respondent : Adv. RPA Ramaweale / Adv Magano

Instructed by : State Attorney

Date of Judgment : 17 April 2015