REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 428/05
Reportable

In the matter between:

GODFREY PAUL PROSCH	**1ST APPELLANT**
GABRIEL JOHANNES JACOBUS LE ROUX	**2ND APPELLANT**
NOREMAC SUGAR ESTATES (PTY) LTD	**3RD APPELLANT**
MARIE ELIZABETH ADRIANA CROUSE NO	**4TH APPELLANT**
HENDRIK PETRUS BOSHOFF NO	**5TH APPELLANT**
JACOBUS ERNST POTGIETER BOSHOFF	**6TH APPELLANT**

and

IMPALA WATER USERS ASSOCIATION **RESPONDENT**

CORAM: FARLAM, BRAND, LEWIS, PONNAN JJA et THERON AJA

HEARD: 28 AUGUST 2006

DELIVERED: 28 SEPTEMBER 2006

SUMMARY: Water – National Water Act 36 of 1998 – water user association – constitution of - power to assess water use charges –whether properly compiled assessment roll prerequisite to liability – whether association empowered to assess water use charges to raise funds to pay any debt legally due by it.

Neutral citation: This judgment may be referred to as *Prosch v Impala Water Users' Association* [2006] SCA 125 (RSA).

JUDGMENT

FARLAM JA

INTRODUCTION

[1] The appellants appeal to this Court with leave of the court *a quo* (Ploos van Amstel AJ) against the whole of the judgment and the orders made consequent thereon in the Natal Provincial Division of the High Court in five cases which, by agreement between the parties, were dealt with together.

[2] In each of these cases the court *a quo* ordered payment of a capital sum plus interest thereon to the respondent, a water user association established in terms of the National Water Act 36 of 1998. In each case the court *a quo* declared that the respondent was entitled in terms of s 59(3)(b) of the Act to restrict the supply of water to the appellant or appellants concerned to a quantity of 1 000 litres per hour until the amounts set forth in the order, together with interest, have been paid.

[3] The appellants also appeal with leave of the court *a quo* against a further order dismissing their application for security for their costs. The respondent brings a cross-appeal, also with leave from the court *a quo,* in respect of the order for costs.

FACTS

[4] The appellants are all farmers and water users within the area of operation of the respondent. For some years a dispute has existed between the respondent and a number of its members as to the legality of a portion of the water charge raised and assessed by the respondent on its members. The portion in dispute relates to the costs of financing the construction of the Paris-Bivane dam, the members concerned disputing liability to the respondent for what may be described as the dam financing component of the water charge. This is the third occasion on which this court has had before it an appeal dealing with issues arising from this dispute. The judgment in the first such case, reported as *Impala Water Users Association v Lourens NO* [2004] 2 All SA 476 (SCA), related to a spoliation order granted against the present respondent at the instance of some of its members after it had, in purported reliance on its powers under s 59(3)(b) of the Act, restricted the flow of water to the properties of the members concerned by locking the sluices

serving their properties.

[5] The second case in the series, *Lourens NO v Impala Water Users Association* [2006] SCA 82 (RSA), was heard on 19 May of this year and judgment was given on 31 May 2006. It has not yet been reported. One of the issues which was to have been argued on behalf of the appellants in this case, viz whether the notices given by the respondent to the appellants in terms of s 59(4) of the Act were premature, with the result that the purported invocation of the remedy created by s 59(3) was unlawful, was decided in favour of the respondent. It is accordingly unnecessary to say anything about it in this judgment. In both the majority and minority judgments in the second case the first case was referred to as 'Impala 1'. I shall follow that usage and in line with it call the second case 'Impala 2'.

[6] *Impala 2* concerned the water use charges imposed by the respondent for the 2002/2003 year. The present case relates to the 2003/2004 year, that is to say the period from 1 March 2003 to 28 February 2004. As in *Impala 1* and *Impala 2* the dispute relates to the dam financing component of the water use charges imposed.

[7] The respondent launched 31 virtually identical, but separate, applications against 31 of its members. In each application orders were sought calling upon the member concerned to pay the balance allegedly owing in respect of water use charges, and authorizing the respondent to act in terms of s 59(3) of the Act and to reduce the flow of water to the member's property until the amount claimed was paid. An agreement was eventually reached between the respondent and the 31 members that (i) initially five matters would be proceeded with, (ii) full papers would be filed only in these matters; (iii) argument would be presented only in the matter of Noremac Sugar Estates (Pty) Ltd, the third appellant, and (iv) the outcome of the remaining four matters would depend on the success or failure of the defences raised by the third appellant insofar as these defences are common to the other four cases.

RELEVANT STATUTORY PROVISIONS AND CLAUSES IN THE

RESPONDENT'S CONSTITUTION

[8] Before these defences are considered it will be convenient if I set out the sections in the Act and the clauses in the respondent's constitution on which the appellants relied in support of these defences.

[9] The empowering provisions under the Act are contained in Chapter 5, comprising sections 55 to 60. The introductory sentence in the preamble to Chapter 5 reads as follows:

'This Chapter deals with the measures to finance the provision of water resource management services as well as financial and economic measures to support the implementation of strategies aimed at water resource protection, conservation of water and the beneficial use of water.'

[10] Under the sub-heading 'Part 1: Water use charges' the preamble further states:

'In terms of Part 1 the Minister may from time to time, after public consultation, establish a pricing strategy which may differentiate among geographical areas, categories of water users or individual water users. . . . . 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. . . . .'

[11] Section 56 provides that the Minister may establish a pricing strategy for charges for any water use. Subsection (2), as far as is material, provides:

'(2) The pricing strategy may contain a strategy for setting water use charges –

. . .

(b) For funding water resource development and use of waterworks, including –

. . . .

(ii) the costs of design and construction;

(iii) pre-financing of development;

(iv) the costs of, operation and maintenance of waterworks . . . .'

[12] Section 57(1)(b) of the Act provides that water use charges 'must be made in accordance with the pricing strategy for water use charges set by the Minister'.

[13] The pricing strategy established by the Minister provides that water user associations must, for the purpose of water use charges, take into

account:

‘(a) recovery of overheads, operations and maintenance costs;

(b) recovery of capital, costs and the servicing of loans . . . .’

[14] Section 60(1) reads as follows:

‘(1) A charge made in terms of section 57(1), including any interest, is a charge on the land to which the water use relates and is recoverable from the current owner of the land without releasing any other person who may be liable for the charge.’

[15] Water user associations are dealt with in Chapter 8 of the Act. In the preamble to Chapter 8 the following is stated:

‘Although water user associations are water management institutions their primary purpose . . . is not water management. They operate at a restricted localised level, and are in effect co-operative associations of individual water users who wish to undertake water-related activities for their mutual benefit.’

The preamble continues:

‘The functions of a water user association depend on its approved constitution, which can be expected to conform to a large extent to the model constitution in schedule 5. . . .’

Subsections (1) and (4) of Section 93 are in the following terms:

‘93(1) Schedule 5 contains a model constitution which may be used as a basis for drawing up and proposing a constitution for a proposed water user association.’

‘(4) A constitution adopted by a water user association is binding on all its members.’

Section 94(1) reads as follows:

‘A water user association is a body corporate and has the powers of a natural person of full capacity, except those powers which –

(a) by nature can only attach to natural persons; or

(b) are inconsistent with this Act.’

[16] The principal functions of the respondent are set out in clause 4 of its constitution. For present purposes it is sufficient to quote clause 4.1, which, as far as is material, reads as follows:

‘4.1 The principal functions to be performed by the Association in its area of operation are:

. . . .

i. To construct, purchase or otherwise acquire, control, operate and maintain waterworks considered necessary for –

. . . .

(ii) supplying water to land for irrigation or other purposes.’

Clause 5 deals with ancillary functions of the respondent. Clause 5.1 reads as follows:

'The Association may perform functions other than its principal functions only if it is not likely –

a. to limit the Association's capacity to perform its principal functions; and

b. to be to the financial prejudice of itself or its members.'

Clause 17, which deals with the raising of loans, is in the following terms:

'17.1 The Management Committee of the Association may raise by way of loans, including bank overdrafts, lease, instalment sale or any other appropriate financing mechanism, any funds required by it for the purpose of carrying out of its functions under this constitution or the Act.

17.2 Whenever the Management Committee proposes to raise a loan, it must give notice in writing of its intention, setting out details of the proposal. The notice must be given to every member of the Association not less that 21 days before the date of the meeting of the Committee at which the proposal will be considered.

17.3 No loan may be raised without a resolution of the Management Committee of the Association passed at a meeting at which not less than two-thirds of the members of the Committee are present.

17.4 The Management Committee of the Association may in the process of raising funds for the purpose of carrying out its functions as per 17.1, grant appropriate security (including leasing of assets) for the financing facility.'

[17] Clause 18 deals with charges and their recovery. It provides as follows:

'18.1 For the purpose of defraying any expenditure that the Management Committee of the Association has lawfully incurred or may lawfully incur in carrying out its functions and duties the Committee may annually assess charges on members according to the pricing strategy for water use set by the Minister. The Committee must for purposes of the assessment take into consideration the budget prepared by the Executive Committee for Sub-area 1 to cover the operational, maintenance and betterment requirements in respect of waterworks managed and controlled by that Committee.

18.2 The Management Committee may recover the charges assessed from either

a. the owners of the land concerned; or

b. any person to whom water is supplied on the land.

18.3 Whenever the Management Committee has assessed a charge, the Committee must prepare an assessment roll setting forth –

a. the name of each member liable to pay charges;

b. a description of the piece of land, which may be a specially delineated area, in respect of which the charge is assessed;

c. the quantity of water or abstraction time period to which the member is entitled;

d. the amount of the charge assessed;

e. the date or dates on which payment is due and the amount due on each date; and

f. the rate of interest payable on non-payment and the effective date of interest.

18.4 A copy of the assessment roll must lie open for inspection in the office of the Association at all reasonable times by any member of the Association.

18.5 If after proper notice, any charge, including interest due to the Association, is more than 90 days in arrears, the Association may in addition to the powers vested in it in terms of section 59(3) of the Act, without further notice to the member, collect the amount due by issuing summons in a Magistrate's court with jurisdiction, regardless of the amount involved, in which event the member will be responsible for all collection and legal costs, inclusive of attorney and client costs.'

APPELLANTS' CONTENTIONS

[18] The first two defences relied on by the appellants related to the respondent's assessment roll. It was pointed out that the extracts from the roll annexed to the founding affidavit did not reflect the due date for payment and the rate of interest as required by clause 18.3 of the constitution. The respondent had annexed to the replying affidavit filed on its behalf the entire assessment roll, which included two additional documents, addressing both the due date and the interest rate, which were lacking on the schedule annexed to the founding affidavit.

[19] The appellants' counsel drew attention to certain features of the two additional documents annexed which, they contended, cast grave doubt on the authenticity of these documents. It was submitted that, absent a reference for oral evidence, it had to be accepted that the document relied on by the respondent did not constitute a proper assessment roll as envisaged by clause 18 of the constitution. It was further submitted that on the scheme of clause 18, as read with the Act, a proper assessment roll as envisaged by clause 18.3 is a pre-requisite to any liability. In the circumstances, so it was contended, no liability on the part of the appellants to pay the assessments had been shown.

[20] It was further contended on behalf of the appellants that as the assessment roll, on their version, did not reflect the date on which payment of the water use charges claimed was due the respondent was not empowered

to claim payment of the charges from its members. This was so, it was argued, because the power conferred upon it by clause 18.5, which was the sole source of the respondent's power to claim payment of the charges, only arose when the charges in question were in arrears for more than 90 days. As there was no due date reflected on the roll the period of 90 referred to in clause 18.5 had not started to run.

[21] Counsel for the appellants raised a further defence which related only to the third appellant. In this regard they submitted that the assessment roll relied on and annexed to the papers by the respondent did not apply to the properties of the third appellant in respect of which the application was brought.

[22] The appellants' main substantive defence to the claim for payment of the dam financing component of the water use charges was based on the contention that it was never the intention of the legislature to include under the rubric of water use charges liability incurred by the management committee on behalf of a water user association on a frolic of its own, or contrary to the constitution, or not for the purpose of performing any of its functions in terms of the constitution. Developing this submission, the appellants' counsel referred to the fact that the dam financing component of the water use charges is entirely based on the costs of servicing a loan allegedly due by the respondent to First Rand Bank Ltd in terms of a loan agreement dated 29 January 2004, (referred to hereinafter as 'the term loan'). This agreement, it was common cause, was concluded to consolidate the respondent's alleged existing indebtedness under previous loans to First Rand Bank Ltd and the Land Bank, and to compromise a dispute between the respondent and First Rand Bank Ltd arising from a so-called 'Hedge Agreement'. As far as the Hedge Agreement was concerned, the appellants contended that it had to be accepted on the papers that this agreement was not authorized by the management committee of the respondent's predecessor, the Impala Irrigation Board. As far as the respondent's alleged existing indebtedness was concerned, the appellants referred to a bridging finance loan purportedly concluded between the Impala Irrigation Board and First Rand Bank Ltd in

December 1999 in terms of which an amount of some R9.7 million was lent and advanced to the irrigation board, and two further interim loans, one of R7 million advanced to the irrigation board in February 2001, and another of R1 million advanced in July 2001.

[23] The appellants averred that the decision to enter into the bridging finance loan agreement was taken by the building committee and not by the board of the irrigation board. As far as the interim loans were concerned, it was the appellants' contention that these loans were entered into without prior notice having been given to the members as required by clause 17.2 of the constitution. The appellants also challenged the validity of the term loan agreement on several grounds. These were (a) that it was not authorised by a proper resolution of the respondent's management committee; (b) that clause 17.1 of the constitution was not complied with because the loan was not raised to carry out any of the respondent's principal functions under the constitution or the Act but to compromise an existing dispute and consolidate the respondent's existing indebtedness, nor was it validly raised to carry out any of the respondent's ancillary functions because it was to the financial prejudice of the members; (c) that clause 17.2 of the constitution had not been complied with because, although the members had received details of the proposed agreement more than twenty-one days before the loan agreement was concluded, these details referred to the original proposed agreement and not to the agreement actually concluded in respect of which certain terms were renegotiated; and (d) that the charges raised were not based on an existing debt in that they related to the water year commencing 1 March 2003 and terminating at the end of February 2004 and the application related to charges raised during the months June to December 2003, clearly on the basis of an anticipated payment schedule forming part of the term loan which was only concluded on 29 January 2004.

[24] The appellants also contended that they have a damages claim against the respondent based on the respondent's alleged conduct in failing to comply with the provisions of clause 17 before the loan agreement with First Rand Bank Ltd was concluded. In this regard it was argued that, if it is found that

they are liable to the respondent in respect of the dam financing component of the water use charges, they will have suffered damages, as a result of the alleged breach, in the equivalent amount of whatever they may be found to be liable to the respondent in respect of such charges. In the circumstances, so they contended, each of the appellants' claims for damages in this regard is in respect of a liquidated amount which in law is capable of set-off.

DISCUSSION

[25] I do not think that the appellants' defences based on the respondent's alleged failure to prove a properly compiled and complete assessment roll can be upheld. I agree with the submission advanced by the respondent's counsel that there is no basis for holding that compliance with clause 18 of the constitution is a pre-requisite either for the right to raise charges or to launch proceedings for payment thereof. The clause does not in terms state that if clause 18.3 is not complied with there will be no liability and no factor was advanced which leads to the implication of such an intention on the part of those responsible for drafting or adopting the constitution.

[26] I am also unable to agree with the submission that, as no due date for payment was reflected in the assessment roll, the charges could not be claimed as they were not yet 90 days in arrear. It was alleged in the founding affidavit that charges are payable within 30 days: this was admitted in the answering affidavit filed on behalf of the third appellant. Clause 18.5 takes the case no further. It can scarcely be interpreted to exclude the jurisdiction of the High Court. As I read it, its effect is to confer a right on the respondent to recover both legal costs, on the attorney and client scale, and collection costs where the charges are claimed in the magistrate's court having jurisdiction over the defendant and the charges are more than 90 days in arrears and the 'proper notice' has been given. This sub-clause cannot in my view be interpreted to mean that unpaid charges can only be claimed when they are more than 90 days in arrear.

[27] The fact that the extract annexed to the founding affidavit was not applicable to the third appellant also takes the case no further. The notice of

motion was amended to correct the erroneous lot numbers and amounts contained therein and in consequence thereof this ‘defence’ fell away.

[28] I proceed now to consider what I have described as the appellants’ main substantive defence, the alleged invalidity of the term loan agreement with First Rand Bank Ltd and the consequent inability of the respondent to raise water use charges to service the loan. Though the appellants aver that that agreement was invalid they do not contend that the respondent is not obliged to repay the loan. They could not do so in view of the fact that the management committee’s decisions to accept the loan obtained by the irrigation board with regard to bridging finance, to take further interim loans, to compromise the ‘hedge’ claim and to consolidate the respondent’s debt in the term loan agreement have been ratified several times. The respondent was clearly liable to First Rand Bank Ltd.

[29] As the respondent is liable to repay the loan, a payment made by the respondent to the First Rand Bank Ltd in respect of this indebtedness would obviously be a lawful payment. It would accordingly be expenditure which was lawfully incurred. The management committee on the plain language of clause 18.1 would be entitled to raise water use charges to cover it. If that were not so, one would, as counsel for the respondent argued, have the absurd situation (which the drafters of the respondent’s constitution could never have intended) that, although virtually its main source of the income with which it can defray its expenses is water use charge income, its powers would, in certain circumstances, not extend to raising charges to enable it to pay its debts.

[30] I am also of the view that the appellants’ defence based on the fact that the charges were not raised to pay an existing debt but a debt arising from a loan agreement, which it was anticipated would be concluded in the future, is without substance. Clause 18.1, it will be recalled, empowers the management committee to assess charges on members to defray expenditure the respondent has lawfully incurred or which it may lawfully incur. The power of assessment under clause 18.1 accordingly extends not only to moneys to

be used to defray expenditure already incurred but also to expenditure which may be incurred in the future. Counsel for the appellants endeavoured to answer this point by submitting that the management committee's power to raise an assessment in order to defray expenditure that may be incurred had to be read, where the expenditure in question would have been in respect of a loan, as being subject to the requirement in clause 17 that before a loan is raised there has to be compliance with the provisions of subclauses 17.2 and 17.3. I do not agree that clause 18.1 should be read as being subject to this implied qualification. It is not self-evident why a loan which it is anticipated will be concluded towards the end of a water year (and in respect of which the giving of the notice required by clause 17.3 will take place shortly, but not less than twenty-one days, beforehand) cannot form the basis of an assessment. If the drafters of the constitution had intended the power to raise an assessment in respect of water use charges to be qualified in this way I would have expected them to have included it in express terms in clause 18.1.

[31] I turn now to the appellants' alleged claim for damages against the respondent flowing from a breach of clause 17 of the constitution. There are at least two answers to this point. The learned judge in the court *a quo* held, correctly in my view, that the claim, if it existed, would in fact not be capable of easy ascertainment. If the claim had merit, the quantum of the appellants' damages would have been the difference between the amount payable in consequence of the alleged unlawful conclusion of the term loan agreement and the amount which would have been payable if the agreement had not been concluded. Unless one assumes that no water use charges would have been payable in respect of the dam financing component if the term loan agreement had not been concluded there would have been *some* amount payable in respect of this item. What it would have been is not clear but it is overwhelmingly probable that some amount would have been payable under this head. The Land Bank loan, for example, would still have been repayable. By December 2003 it had risen to R182,5 million with interest payable at prime minus one per cent and the repayments escalating at 12 per cent per annum. Furthermore, even if the management committee had exceeded its powers in concluding the agreement, this would have been to the detriment

primarily of the respondent, and only through that circumstance to the ultimate detriment of the respondent's members, including the appellants. As counsel for the respondent correctly submitted, it is unclear how the party alleged to be wronged in the first place, what one may call the primary victim, the respondent, can be said to be liable to its members, the secondary victims, for the consequential loss suffered by them. This is so even if one assumes that the constitution can be regarded as a contract not only between the members *inter se* but also as a contract between each of them and the respondent itself. This assumption is not necessarily a correct one: *cf* s 65(2) of the Companies Act 61 of 1973, which, unlike s 93(2) of the Act, provides that the memorandum and articles 'bind *the company* and the members' and *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881 at 897 and *Gohlke & Schneider v Westies Minerale Bpk* 1970 (2) SA 685 (A) at 692 F-G. If there was a breach, it is difficult to see on what basis it can be said that the *respondent* breached the contract and not the members of the management committee. In my view, if there was a breach in this regard, it is not one in respect of which the members have an action against the respondent.

[32] In the circumstances I am satisfied that the appellants are not able to resist the respondent's claim for unpaid water use charges by invoking the set off of a liquidated claim which wipes out, as it were, their indebtedness in this regard to the respondent.

[33] In the course of argument counsel for the appellants contended that the respondent had not made out a case in its papers that there had been a valid decision, or indeed any decision at all, by the respondent's management committee to raise a water use charge for the 2003-2004 water year. For all we know, it was said, they may just have sent out invoices. This point was not taken in the opposing affidavits filed on behalf of the appellants. Apart from the arguments advanced in respect of the assessment roll and the alleged set-off, the appellants' case focused on the power of the respondent to raise water use charges based on the dam financing component. It is common cause that they paid the assessment, except insofar as it related to the dam

financing component: in other words they proceeded from an assumption that the assessment was valid except for the portion relating to the financing of the dam. In the circumstances I am satisfied that the point is without merit.

[34] The learned judge in the court *a quo* made no order as to costs in the four applications relating to the first, second, fourth and fifth, and sixth appellants but he ordered all the appellants, jointly and severally, to pay the respondent's costs in the application against the third appellant. He did this because he was of the view that it would have been sensible for the respondent to launch one application in the High Court and to institute action against the other respondents in the magistrate's court, on the basis that the actions would follow the result of the High Court application. This approach overlooks the fact that the respondent, not unreasonably, wanted to be able to restrict the supply of water in terms of s 59(3)(b) of the Act to each of the appellants, once it had obtained judgment against them for the unpaid water use charges. If the procedure approved by the court *a quo* had been adopted it could only have utilized its remedy under s 59(3)(b) against the respondent cited in the High Court and would have had to wait until it obtained judgment against the others in the magistrate's court. In the circumstances I am of the view that the respondent's cross appeal against the costs order in the court *a quo* must be upheld.

[35] In view of my conclusion that the appellants' appeals must fail, their further appeals in relation to the court *a quo's* refusal to order the respondent to provide security for their costs must also be dismissed with costs.

ORDER

The following order is made:

A. The appeals brought by the first, second, third, fourth and fifth, and sixth appellants against the judgment of the court *a quo* in NPD case nos 1515/2005, 1516/2005, 1517/2005, 1518/2005 and 1519/2005 are dismissed with costs, including those occasioned by the use of two counsel.

B. The appeals brought by the appellants against the order of the court *a quo* in respect of their application for security for their costs are

dismissed with costs, including those occasioned by the use of two counsel.

C. (i) The cross appeal brought by the respondent against the orders made in respect of the costs in the cases listed in paragraph A above is upheld with costs including those occasioned by the use of two counsel.

(ii) Paragraphs (g) and (h) of the order made in the court *a quo* are set aside and replaced by the following:

‘(g) The respondents in each of the applications referred to above are ordered to pay the applicant’s costs in the application, including those occasioned by the use of two counsel.’

…….
IG FARLAM
JUDGE OF APPEAL

CONCURRING
BRAND JA
LEWIS JA
PONNAN JA
THERON AJA