



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 63939/2012

Date: 7 December 2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	☒
(3) REVISED	☐
7/12/2012	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

EXXARO COAL (MPUMALANGA) (PTY) LTD
EXXARO COAL (PTY) LTD

First Applicant
Second Applicant

And

THE MINISTER OF WATER AFFAIRS
THE JUDICIAL SERVICE COMMISSION

First Respondent
Second Respondent

JUDGMENT

PRETORIUS J.

- [1] The applicants approach the court on an urgent basis and seeks relief against the first respondent. The principal relief being sought is:

"An order that pending the final determination of appeals already instituted by the applicants on 23 May 2012 and 13 July 2012 in terms of section 148 of the National Water Act, that the operation and execution of directives issued by the first respondent on 11 April 2012 and 13 June 2012 be suspended, alternatively that the first respondent be interdicted from taking any steps against the applicants pursuant to or in execution of the directives issued against the applicants on 11 April 2012 and 13 June 2012."

- [2] The applicants argued that if the court grants the principal relief, the remaining relief may be postponed *sine die*. This relief is that the first respondent:

"Orders that the first respondent perform such actions as are necessary to appoint the chairperson, deputy chairperson and members of the Water Tribunal (in order that the appeals lodged by the applicants may be heard)."

- [3] and further:

"An order declaring that a directive issued by the Minister, purportedly in terms of section 150 of the National Water Act, in which the first respondent directed that the appeals not be heard

by the Water Tribunal but by a Mediation Panel, is invalid and of no legal force or effect."

- [4] No relief is sought against the second respondent.
- [5] However, during argument, Mr Maritz, counsel for the applicants, argued that the court should adjudicate the application as a whole as all the facts are before the court.
- [6] On 11 April 2012 and 11 June 2012 the Mpumalanga office of the first respondent issued two directives to the two applicants respectively, in terms of section 53 (1) of the National Water Act (NWA), 1998. These directives, in terms of section 53 (1), set out that the applicants were using water in contravention of section 22 of the National Water Act. The applicants had to rectify the alleged contravention according to the directives.
- [7] The applicants lodged appeals to the Water Tribunal in terms of section 148 (1)(i) of the National Water Act. Section 148 (1)(j) provides:
- "148. Appeals to Water Tribunal. – (1) There is an appeal to the Water Tribunal –*
- ...*
- (j) against a directive issued by a responsible authority under section 53 (1), by the recipient thereof;"*

- [8] Section 146(1) of the National Water Act provides as follows for the appointment of the Water Tribunal:

"146. Establishment of Water Tribunal. – (1) The Water Tribunal is hereby established.

- (2) *The Tribunal is an independent body which –*
- (a) has jurisdiction in all the provinces of the Republic;*
 - and*
 - (b) may conduct hearings anywhere in the Republic.*
- (3) *The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary.*
- (4) *Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge.*
- (5) ***The chairperson, the deputy chairperson, and the additional members of the Tribunal are appointed by the Minister on the recommendation of the Judicial Service Commission contemplated in section 178 of the Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971 (Act No.34 of 1971, in accordance with item 3 of Schedule 6."* (Court's emphasis)**

- [9] The applicants addressed a letter to the respondents on 15 June 2012, after the second directive had been received. A meeting was held at the offices of the Regional Department of Water Affairs on 19 June 2012 between representatives of the second applicant and representatives of the Department of Water Affairs.
- [10] A notice of appeal against the directive of 11 April 2012 was delivered to the Department of Water Affairs on 13 July 2012, six weeks before the chairperson of the Water Tribunal's contract came to an end and before the members of the Water Tribunal's terms expired.
- [11] On 30 August 2012 a further meeting was held between representatives of the applicants and the respondents. At this meeting the representatives of the applicant were informed that the Water Tribunal had been suspended due to the fact that it no longer had a chairperson and that the remaining members of the Water Tribunal's terms would expire on 31 August 2012.
- [12] In a letter, dated 20 September 2012, the attorneys for the applicants sent a letter requesting, on an urgent basis, that the respondents comply with their obligations in terms of item 3(1) of the Act to appoint a chairperson in terms of section 146 (5) of the Act and to ensure that the Water Tribunal is reinstated.

[13] On 2 October 2012 the applicants' attorneys of record received an e-mail informing them that "the appeal must be dealt with by the Mediation Panel as an *interim* arrangement."

[14] A document, signed by the first respondent on 9 September 2012, was attached to the e-mail. This document was a "Directive in terms of section 150 (1) of the National Water Act."

[15] Section 150(1) of the Act provides:

"150. Mediation. – (1) The Minister may at any time and in respect of any dispute between any persons relating to any matter contemplated in this Act, at the request of a person involved or on the Minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation."

[16] The document was addressed to:

"All appellants with appeals pending in the water tribunal"

[17] The directive sets out:

"The operations of the Water Tribunal is currently placed in abeyance pending a legislative amendment process of the National Water Act and in light of the fact that the term of

office of the current Water Tribunal came to an end in August 2012." (Court's emphasis)

- [18] No indication is given whether a new Water Tribunal will be appointed and when this would take place. Up to date no steps have been taken to ensure the appointment of a Water Tribunal.
- [19] On 23 October 2012 a letter was addressed to the applicants notifying them that the mediation had been set down for 7 November 2012. On 31 October 2012 the applicants' attorneys informed the Acting Registrar of the Water Tribunal that they were not submitting to the proposed mediation process in the place of appealing the directives of 11 April 2012 and 11 June 2012.
- [20] There is no provision in the National Water Act granting the first respondent the power to disband the Water Tribunal. There is no discretion vested in the first respondent to decide not to appoint a Water Tribunal even if she does not agree with the provisions in the National Water Act which provides for the Water Tribunal to be constituted. She has to comply with section 146 (5) of the National Water Act, until other proposed legislation has been promulgated and enacted.

[21] Section 148 (1)(j) of the National Water Act grants the Water Tribunal exclusive jurisdiction to hear appeals against directives issued in terms of section 53(1) of the National Water Act – as is the case in the present application. The decision by the first respondent not to appoint a chair person and deputy chairperson to the Water Tribunal infringes on the applicants constitutional right in terms of section 34 of the Constitution. The first respondent has no power of authority outside the legislation. Section 34 provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[22] The contention by the respondents that mediation in terms of section 150 (1) of the National Water Act is an internal remedy which the applicants should have availed themselves of cannot be entertained. The dispute is not finally decided and no binding ruling can be made through mediation. The first respondent could have directed the parties to mediate the matter and if not successful they could continue with the appeal, but that is not what she did. She directed the applicants to mediate instead of proceeding with the appeal, as she does not intend to appoint a Water Tribunal as the Act requires her to do.

[23] The court finds the directive directing the applicants to mediate as invalid and *ultra vires*. Such a directive can never take away the right of appeal which was created by legislation.

[24] Item 3 of Schedule 6 of the National Water Act specifically provides that the first respondent is obliged to take steps to fill vacancies as they occur that may from time to time exist in the Water Tribunal.

[25] It is incumbent on the first respondent to uphold the rule of law and perform her constitutional obligations. She cannot *mero motu* decide to do away with the Water Tribunal and replace it with a panel of mediators.

[26] The exercise of public power must comply with the Constitution, which is the supreme law and the doctrine of legality. The first respondent's actions is a failure to comply with her constitutional obligations. It is not in her power to suspend certain sections of the National Water Act as they do not suit her. That is the exclusive domain of the legislature upon whose functions she is intruding.

[27] The appeals have been delayed for an inordinate period of time due to the first respondent's lack of action by not appointing a Water Tribunal, as the National Water Act provides. The applicants have a right to a fair and expeditious hearing of the appeals according to the Constitution.

[28] Although the minister indicates that the National Water Act will be amended, there is no time line and her counsel could not give any indication that such an amendment is imminent or that it has been considered by Parliament. There is not even a draft amendment to which the first respondent's legal representative could draw the court's attention to. In the *interim* the present National Water Act applies, whether it suits the Minister's purposes or not.

[29] In the circumstances it is clear that a Water Tribunal will have to be appointed to deal with the appeals, as the appellant cannot be forced to partake of mediation where there is no prospect that the disputes will be resolved by mediation.

[30] Although the respondents indicated that no criminal prosecution will be proceeded with, it is not adequate relief as the applicants have a right to have the appeals against the directives to be heard by the Water Tribunal.

[31] According to the Promotion of Administrative Justice Act 2000, (PAJA) the directive directing the applicants to mediate is an administrative action. I must agree that the first respondent is not authorised to take such an administrative action as there is no provision therefor in the National Water Act. The directive was influenced by an error of law as

mediation cannot replace appeals according to the provisions of the National Water Act.

[32] The directive is an administrative action not authorised by the National Water Act and is a procedure directed to circumvent the necessity to appoint a Water Tribunal.

[33] The actions by the first respondent set out above causes the actions to be unconstitutional and/or unlawful. In this instance the first respondent has a legal duty to appoint the members of the Water Tribunal and her failure to do so could be judicially reviewed in terms of section 6 (3) of PAJA.

[34] The court accepts the applicants' argument that the fact that directives were issued and that they have had no opportunity to address the issues in the respective directives through appeal procedures are highly prejudicial to the applicants. There is no mechanism for them to clear their names as the issue of the directives in April and June 2012 had been widely reported in the press. The respondents do not deny that at the meeting of 30 August 2012 officials of the respondents indicated that there were currently 60 appeals pending before the Water Tribunal. This indicates what an important function the Water Tribunal plays in adjudicating appeals.

[35] The court has taken note of the nature of the disputes between the parties and must agree that these disputes cannot be resolved through mediation. The dispute in both appeals pertain to the existence or non-existence of a legal right, which should be heard by the Water Tribunal who will be able to make a binding ruling which would be final.

[36] There is no indication by the respondents as to what the further steps would be should mediation not succeed and the Water Tribunal has not been appointed. It is strange that, although the Minister knew that the members of the Water Tribunal's terms expired on 30 August 2012, there was no plan in place to replace them prior to 30 August 2012. The first respondent waited and did not comply with section 146 (5) of the National Water Act by causing the Water Tribunal to be appointed timeously.

[37] I must agree that the applicants have no other recourse but to approach the court. There is no functional Water Tribunal and no indication that the first respondent will remedy this condition at any stage soon. These are multi-national mining companies who have to plan ahead. At present they cannot do so due to the Minister's actions and her lack of complying with the provisions of the Act.

[38] The first point *in limine* by the respondents regarding *locus standi* was apparently abandoned as Ms Cassim did not argue the point *in limine*.

Ms Cassim indicated the matter was not urgent. I cannot agree if I take into consideration the history of the matter – as late as 31 October 2012 the parties were still communicating with one another. The last communication was when the applicants informed the respondents that they were not interested in mediating the matter as the matter was not able to be resolved by mediation.

[39] I must disagree with the respondents that the applicants had to request reasons why their appeals had not been heard. Section 5 of PAJA is not peremptory and there was no duty on the applicants to request reasons at all. This argument is thus without any substance.

[40] The nature of the relief is not a judicial review of the first respondent's decision in terms of PAJA, but the applicants are seeking a *mandamus* against the first respondent to perform her duties in terms of the National Water Act and an interdict pending the final determination of the appeals once the Water Tribunal has been constituted once more.

[41] The first respondent did not comply with the provisions of section 237 of the Constitution which stipulates that all constitutional obligations must be performed diligently and without delay.

[42] In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)** the court stated at paragraph [21]:

*"When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases **where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.**" (Court's emphasis)*

[43] In **S v Mabena 2007 (1) SACR 482 (SCA)** at paragraph 2 the court held:

*"[2] The Constitution proclaims the existence of a State that is founded on the rule of law. **Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity.** That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. **Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law.** As in the case of*

other State authority, the exercise of judicial authority otherwise than according to law is simply invalid.” (Court’s emphasis)

[44] In **International Trade Administration Commission v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 (CC)** at paragraph [92] the court set out:

*“[92] In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. **However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred. in that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.**” (Court’s emphasis)*

[45] In **Reed and Others v Master [2005] 2 All SA 429 (E)** an internal remedy is described in paragraph 20 as:

“The section applies to internal remedies, and not simply to any form of potential extra-curial redress. A remedy, in this context, is defined in the New Shorter Oxford English Dictionary as a “means of counteracting or removing something undesirable, redress, relief; legal redress”. Inherent in this concept, as it is used in its iegai context is the idea that a remedy, in order

to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy." (Court's emphasis)

[46] I have taken note of Mr Maritz' argument on behalf of the applicants that I should grant all the relief sought. I must agree that I have read all the papers, listened to all the arguments and considered all the facts and authorities and am therefore in a position to make a decision to grant all the relief sought by the applicants or to dismiss it.

[47] However, I am loath to enter into the area where the executive has to comply with legislation. I intend granting the interdict as set out in prayer 2. The other relief is postponed *sine die* to enable the executive to comply with the provisions of the Act.

[48] The applicants can approach the court on the same papers, should the first respondent not rectify the situation within a reasonable time by taking steps to appoint a Water Tribunal.

[49] There can be no other conclusion than that the first respondent did usurp the Water Tribunal's functions by appointing a mediation panel in its stead and by doing so ignoring her statutory obligations.

[50] The following order is made:

1. The application is urgent;
2. Pending the final determination of the appeals already instituted by the applicants on 23 May 2012 and 13 July 2012; that the operation and execution of the directives issued by the first respondent on 11 April 2012 and 13 June 2012 (annexures "B" and "C" to the application) is suspended.
3. Prayers 3, 4 and 5 are postponed *sine die*;
4. Costs to be paid by the first respondent which includes the costs occasioned by the use of two counsel.



Judge Pretorius

Case number	: 63939/2012
Heard on	: 22 November 2012
For the Applicant / Plaintiff	: Adv NGD Maritz SC
	: Adv JHA Saunders
Instructed by	: Mahlangu Inc
For the Respondent	: Adv N Cassim
Instructed by	: State Attorney

Date of Judgment

: 7 December 2012