REPORTABLE:	*YES/NO*
CIRCULATE TO JUDGES	*YES/NO*
CIRCULATE TO MAGISTRATES	*YES/NO*

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

Case no: 430/2025
HEARD ON: 17-02-2025,
14-03-2025
DELIVERED: 25-04-2025

In the matter between:

T G BRAAIKUIKENS (PTY) LTD — **1st Applicant**

LYNETTE HENDRIENA ALERS N.O — **2nd Applicant**

and
THE MEC:DEPARTMENT OF WATER AND SANITATION, NORTHERN CAPE PROVINCIAL OPERATIONS — **1st Respondent**

BOEGOEBERG WATER USERS ASSOCIATION — **2nd Respondent**

CORAM: WILLIAMS J

J U D G M E N T

WILLIAMS J:

1. The first applicant, TG Braaikuikens (Pty) Ltd, is the current owner of units 1, 2 and 3 of the Boegoeberg Settlement, !Kheis Municipality (the properties).

2. The second and third applicants are the trustees of the insolvent estate of the previous owner of the properties, Mr JG Husselman.

3. The first respondent is the MEC: Department of Water and Sanitation, Northern Cape Provincial Operations.

4. The second respondent is the Boegoeberg Water Users Association, which was established during 2003 in accordance with the guidelines of the National Water Act 36 of 1998 (the Water Act). The functions of the second respondent include revenue collection (billing agent) for the first respondent, maintenance of the Boegoeberg Canal and infrastructure, control and distribution of raw water, annual reporting of operations to the first respondent and adherence to environmental legislation. The second respondent also supplies water to farms, inclusive of the properties, for irrigation purposes.

5. The applicants brought an urgent application on 16 February 2025 seeking *inter alia* the following relief:

   5.1 that the respondents be prohibited from spoliating the first applicant by closing/cutting/suspending the water usage of the first applicant on the properties;

   5.2 that the respondents be ordered to immediately restore water usage to the properties; and

   5.3 that the respondents be ordered to pay, jointly and severally, the costs of the application on the attorney and own client scale.

6. After hearing some argument on 17 February 2025 I made an order in the form of a *rule nisi*, with return date 14 March 2025 with regard to the relief sought in paragraphs 5.1 and 5.2 above and granted the respondents leave to supplement their opposing affidavit. I also made an order that the application be heard as an urgent application, not merely because the mandament envisages speedy relief but also because the first applicant

farms with various agricultural crops, which in the heat of summer requires irrigation, without which great financial losses could ensue.

7. **Background**

Mr JG Husselman's estate was provisionally sequestrated on 2 June 2023 and a final sequestration order was granted on 14 July 2023.

8. On 7 May 2024 the second respondent sent an e-mail to the trustees of the insolvent estate informing them of Husselman's outstanding water account in the amount of R1, 008, 974. 02 and warning them that should the outstanding account not be paid it would be carried over for the account of the purchaser of the properties and that a directive will be issued for the closure of the water supply to the properties until payment of the full outstanding amount.

9. After further correspondence, the trustees, who hold the view that the issue of Husselman's outstanding water account is one between the insolvent estate and the second respondent, sent an email to the second respondent on 22 May 2024 to prove a claim against the insolvent estate in terms of s44 of the Insolvency Act 24 of 1936.

10. The Deed of Sale for the properties was entered into during February 2024 and the properties were transferred into the name of the first applicant on 16 October 2024. In terms of the Deed of Sale the first applicant was to take occupation of the properties on 31 August 2024.

11. On 3 June 2024 the attorneys for the second respondent e-mailed a letter to the attorneys for the trustees, currently also the attorneys for first applicant, informing that they had received instructions from the second respondent to assist it in proving its claim against the insolvent estate of Mr JG Husselman for the outstanding water charges in terms of s 44(4) of the Insolvency Act. The letter indicated that such a claim would be a

preferent claim and sought to obtain the relevant claim documents for completion by the second respondent.

12. The trustees' attorneys complied with the above request and dispatched the aforementioned claim documents, no doubt satisfied that the claim for the outstanding water charges would be dealt with in accordance with the Insolvency Act.

13. However on 11 September 2024 the attorneys for the second respondent sent an e-mail to the attorneys for the trustees, indicating that they had advised their client to escalate the matter to the relevant authority (the Department of Water and Sanitation (the Department) with specific reference to s59 of the Water Act.

14. On 15 October 2024 Mr JG Husselman was served personally with a notice to suspend or withdraw entitlement to use water, in terms of s54(1) of the Water Act by the Department for failure to pay the water use account in the amount of R1. 23 million as at 31 August 2024.

15. The notice indicated that the Department was aware of the fact that the properties had been sold by the trustees of the insolvent estate and that transfer of the properties into the name of the new owner would take place soon. The notice furthermore gave Mr Husselman the opportunity to make representations in writing within 14 days of receipt of the notice should there be compelling reasons why a suspension or withdrawal of entitlement to use water should not be imposed, failing which the Department would immediately suspend or withdraw his entitlement to use water in terms of s54(3) of the Water Act.

16. On 10 December 2024 the first applicant was served with a notice of intention to suspend or withdraw entitlement to use water in terms of s54(1) of the Act.

17. The attorneys for the first applicant thereafter sent an e-mail to the second respondent's attorneys requesting that any action envisaged by the second respondent or the Department be stayed until a meeting of the parties can be held during January 2025 to establish whether the matter can be amicably resolved without any litigation. The response from the second respondent's attorneys' office was that the relevant attorney was on leave and would only be back in office on 7 January 2025.

18. On 31 January 2025 the first applicant received a further notice or directive from the Department in terms of s 53(1) and (2) of the Water Act, to pay the outstanding water use accounts within 5 days, failing which the Department will carry out any works by closing the water supply in terms of s 53(2) of the Act and take any steps necessary to rectify the contravention and recover the costs thereof from the first applicant.

19. On the morning of 12 February 2025 the attorneys for the applicants e-mailed a letter dated 6 February 2025 to the Department, setting out the history of the matter and the process to be followed in order to prove a claim against the insolvent estate. The relevant portion of the letter reads as follows:

> "4. *The amount due by Mr JG Husselman to the Boegoeberg Water User Association up until date of provisional sequestration, being **2 June 2023**, is subject to the provisions of the Insolvency Act 24 of 1936, and therefore the Boegoeberg Water User Association should prove a claim against the Insolvent estate in terms of Section 44 of Act 24 of 1936.*
>
> 5. *If the Association could prove, by submitting their claim in terms of Section 44 of the Insolvency Act, that the amount due is a liability relating to an incident of the ownership of that property (as provided for in Section 89(5) of Act 24 of 1936), such a claim for the amount then due would on the probabilities be a claim against the Insolvent Estate.*

6. *Be that as it may, the claim will be required to be submitted and would then be investigated by the trustees of the insolvent Estate in terms of section 45 of Act 24 of 1936, if it has been proven under Section 44 of Act 24 of 1936, after which you would be informed accordingly.*
7. *Please take note further that in accordance with the duties of the trustees of the insolvent Estate, the property on which the water rights are registered have been realized by the trustees, and in fact sold to TG Braaikuikens (Pty) Ltd on **12 February 2024** and a copy of the deed of sale is attached hereto as Annexure **"A"** for your convenience.*
8. *The aforesaid property has been registered in the name of TG Braaikuikens (Pty) Ltd.*
9. *You are therefore informed to determine the specific amount due by Mr JG Husselman up until date of provisional sequestration, being **2 June 2023**, for which amount you will have to prove a claim in terms of Section 44 of Act 24 of 1936.*
10. *The amount due by the Estate is therefore in dispute as referred to above, and such dispute can only be resolved if the Association determines the amount due on date of sequestration and proves a claim for such an amount in terms of section 44 of the Insolvency Act. Therefore, a determination should be made as to any water use after the date of sequestration, which is the liability of the Insolvent Estate.*
11. *Lastly, please take not further that if you close the water supply or suspend the water usage as you are threatening in your Directive dated **31 January 2025** without following the steps as advised and set out hereinabove, you would be spoliating our clients, which spoliation will be met by an urgent application to the High Court, Kimberley to prohibit you from spoliation. The costs of such an application will be for your account."*

20. Notwithstanding the aforesaid, and without any response to the applicants' attorneys, the respondents closed off the water supply to the first applicant's properties on the afternoon of 12 February 2025 which in turn led to the urgent application initially brought on 17 February 2025.

The issues between the parties

21. It is not in dispute that the use of the water was an incidence of possession of the properties and that the right to the water enjoyed by the first applicant is capable of protection by the *mandament van spolie* (see *Impala Water Users Association v Lourens NO and Others* 2008(2) SA 495 (SCA).

22. It is also common cause that the first applicant was in peaceful and undisturbed possession of the right to the water and that the respondents disturbed that possession.

23. The only issue with regard to the *mandament van spolie* is whether the respondents' actions were lawful or not.

24. Other than the above, the respondents raised two *points in limine* which can easily be disposed of. The first is that the first respondent's decision to cut off or suspend the water rights of the first applicant constituted an administrative action and as such the appropriate procedure to be followed was to seek a review of the decision in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This point can safely be put to bed in light of the judgement in the *Impala* matter (*supra*).

25. The second *point in limine* raised was one of misjoinder in that the second and third applicants (the trustees) have no *locus standi* since it is clear from the papers that the applicants rely on the first applicant's disturbed possessions for the relief claimed. The submission is not entirely correct. The issue between the parties is whether the interference with the first applicant's right was lawful. In this regard it has been the position of the

trustees that the Insolvency Act is applicable, as can be seen *inter alia* from the letter dated 6 February 2025 addressed to the Department. The actions of e respondents interfere with the statutory obligations of the trustees. The trustees therefore not only have a direct and substantial interest in the subject matter but their involvement in the matter provide a proper factual basis upon which a decision can be made (see *Transvaal Agricultural Union v Min of Agriculture and Land Affairs and Others* 2005(4) SA 212 (SCA) at 227F). There is therefore no merit in this *point in limine*.

26. Returning then to the lawfulness of the respondents' actions. The applicants do not dispute that the respondents have the right, in terms of the Water Act to suspend water usage in certain circumstances. SS 59(3) and (4) of the Act read as follows:

> *"59 (3) If a water use charge is not paid-*
>
> *(a) Interest is payable during the period of default . . . .*
>
> *(b) The supply of water to the water user from a waterwork or the authosization to use water may be restricted or suspended until the charges together with interest have been paid.*
>
> *(4) A person must be given an opportunity to make representations within a reasonable period on any proposed restriction or suspension before the restriction or suspension is imposed."*

27. The first applicant does however dispute the quantum of the water charge due by it by virtue of the provisions of the Insolvency Act and specifically s89 thereof. The relevant portions of s89 read as follows:

"Costs to which securities are subject

89. (1) ***The cost of maintaining, conserving, and realising any property shall be paid out of the proceeds of that property****, if sufficient,* *and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees,* ***and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date, of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realisation****.*

(2) . . . . . .

(3) . . . . . .

(4) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such a tax in respect of any other period.

(5) ***For the purposes of subsections (1) and (4) "tax" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property."***

(own emphasis)

28. The argument on behalf of the applicants is that it is clear from s 89(5) that the amount payable to the respondents is in fact a tax and that therefore s 89(1) is applicable. Therefore the amount due by Mr Husselman is for a maximum period of two years before the sequestration, for which the respondents should prove a claim in terms of s 44(4) of the Insolvency Act, thereafter from date of sequestration to date of transfer of the properties, the water charges are costs in the administration of the insolvent estate and from date of transfer, the new owner (the first applicant) would be liable for the charges reckoned from such date.

29. The first applicant does not deny his liability as aforesaid and has undertaken to pay such amount should the second respondent provide it with the water charges calculated from 31 August 2024.

30. The respondents rely for their entitlement to the full outstanding amount from the first applicant on the provisions of s 60 of the Act which state the following:

"Water use charges are charges on land.
60(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."

31. Mr Olivier who appeared for the respondents, relied on the judgment of Nxumalo J in this division in the matter of *Saunderson v Boegoeberg Water Users Association* (338/22) [2022] ZANCHC 86 (12 August 2022), where the learned judge held, with regard to s 60(1) of the Act, at paragraph 63 of the judgment that:

'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 imposed properties, or did not receive or utilize 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 s 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."

32. The *Saunderson* matter can however be distinguished from the present matter in that the Insolvency Act did not come into play in *Saunderson*. In this regard Mr Olivier countered with the argument that the water usage charges by the respondents do not constitute taxes for purposes of s89 of the Insolvency act. He referred to the matters of *Greater Johannesburg Transitional Metropolitan Council v Galloway NO and Others* 1997 (1) SA 248(w); *Fedbond Participation Mortgage Bond Managers (Pty) Ltd v Steve Tshwete Local Municipality* 2012 JAR 0545 (GNP); and *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO 2001(1) SA 360 (SCA)* in support of this argument.

33. These matters all relate to Municipal charges which had to be paid in order for clearance certificates to be issued before transfer of a property could be affected. It was held in the *Galloway* matter that charges such as for electricity and water, were not taxes for purposes of s 89 of the Insolvency Act since it was not an incidence of the ownership of the land but arose out of agreements which were entered into for the provision of the services and the services themselves. In the *Fedbond* matter, there was not even

any argument or debate as to whether the applicable rates and taxes required to be paid for a clearance certificate fell inside the ambit of the s 85 (5) definition (see paragraph 33 of the judgment).

34. *In casu* s 60(1) states specifically that such water use charges are *"a charge on the land to which the water use relates"*, and would in my view constitute a *"liability which is an incident of the ownership of that property"* as envisaged in s 89(5).

35. The argument by Mr Zietsman SC for the applicants, is that the provisions of the Insolvency Act trump those of the Water Act and should prevail. He pointed out that the only entity which is excluded from the provisions of the Insolvency Act is the Land and Agricultural Bank of South Africa in terms of s90 of the Insolvency Act which states as follows:

> *"90. Land Bank not affected by this Act*
> *The provisions of this Act shall not affect the provisions of any other law which confer powers and impose duties upon the Land and Agricultural Bank of South Africa in relation to any property belonging to an insolvent estate".*

36. Mr Zietsman is correct in this respect. However it should also be noted that in terms of s82(1) of the Insolvency Act which deals with the sale of property after the second meeting of creditors and the manner of sale. The first proviso to s82 (1) is of importance. S 82(1) reads as follows:

> *(1) Subject to the provisions of sections eighty-three and ninety the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct:* ***Provided that if any rights acquired from the State under a lease, licence, purchase, or allotment of land is an asset in that estate, the trustee shall, in his administration of the estate, act in accordance with those***

provisions (if any) which by the law under which the rights were acquired, are expressed to apply in the event of the sequestration of the estate *of the person who acquired those rights: Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the Gazette and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of upon such conditions as the Master may direct."*
(own emphasis)

37. It cannot be disputed that the water use right pertaining to the properties has been acquired from the State under a licence as circumscribed in Part 2 of the Water Act and is an asset in the insolvent estate. In fact the Deed of Sale, clause 25.2, specifically states that the water rights form part of the property sold. Clause 25 also makes provision for the purchaser to comply with the provisions of s25 of the Water Act to obtain transfer of the licence in his name and for the parties to apply jointly for a licence in the name of the purchaser. The Water Act is however silent on any provisions to apply in the event of the sequestration of the person who acquired the rights.

38. In these circumstances, in my view, the respondents are required to prove their claim in respect of the outstanding water usage charges in terms of s44 of the Insolvency Act. That should be the end of the matter.

39. However, Mr Olivier raised an alternative argument and that is that the fact that the first applicant admitted liability for the water usage charges from 31 August 2024 to date in any event permits the respondents to invoke the provision of s59(3) of the Water Act. This concession by the first applicant does not, in my view, assist the respondents at all. The first applicant did not admit being in default, in fact he disputed liability for the whole

outstanding amount as claimed from him by the respondents. In *Lourens NO & Others v Impala Water Users Association* (s 34/04) [2006] SASCA 76 (31 May 2006), Brand JA who wrote the majority judgment, deals with the purpose and structure of ss 5 9 (3) and (4) of the Water Act as follows in paragraphs 52 and 53 thereof:

"52. In my view a proper reading of the 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."*
(own emphasis)

40. In my view the respondents have failed to discharge the onus it bears as set out in the above quoted paragraphs of the *Lourens* judgment in that it has failed to establish the fact of the first applicant's liability i.e. that it has not paid a water charge lawfully raised, and the amount of the alleged liability.

41. In addition, the first applicant had not been given a reasonable opportunity to make representations on any proposed restriction or suspension before its imposition as envisaged in s 59(4). It will be recalled that the respondents had served a notice in terms of s 54(1) of the Water Act, an

intention to suspend or withdraw entitlement to use water due to a failure to pay the water use account on Mr Husselman which was also addressed to him on 15 October 2024. At the time the respondents knew full well that Mr Husselman's estate had been sequestrated and that trustees had been appointed. On 10 December 2024 a similar notice was delivered to the first applicant, but when an opportunity was requested to make representations with a view to settle the dispute, the applicants were informed that the respondents attorney seized with the matter was on leave. On 31 January a directive in terms of s 53(1) and (2) of the Water Act was served on the first applicant. This directive makes no sense in the circumstance of this matter and appears to conflate a failure to comply with a registered water use and a notice to carry out works with a failure to pay a water use account. Be that as it may, this last notification refers to Mr JG Husselman's failure to make representations subsequent to the notice delivered to him and the first applicant's failure to make representations after receiving its notice of intention to suspend within 7 days, as was required. Despite the last notice in terms of s 53(1) and (2) not giving the first applicant an opportunity to make representations, the applicants did in fact do so, albeit late, and it is obvious that these representation were not considered by the respondents at all. On this basis also the respondents should not be allowed to invoke the powers bestowed upon it in terms of s 59(3).

42. It follows that the first applicant is entitled to its spoliation order and all that remains is the issue of costs.

Costs

43. Mr Zietsman argued that by insisting in proceeding to enforce their powers in terms of the Water Act, after at one stage conceding that their claim should be proved in terms of s44 of the Insolvency Act (see paragraph 11 herein) and after having been so informed by the trustees on 22 May 2024, 30 August 2024, 3 September 2024, 20 September 2024 and 12

February 2025, is nothing but and abuse of power on the part of the respondents. I agree with this contention. The manner in which the respondents conducted their interactions with the applicants is also of concern. I see no reason why the respondents should not bear the costs of this application on the attorney and client scale.

The following order is made:

(a) Paragraphs 2.1 and 2.2 of the *rule nisi issued on 17 February 2025 is confirmed and made final.*

(b) The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved on the scale of attorney and client

[redacted]

CC WILLIAMS
JUDGE

For Applicants:	Adv P Zietsman SC
	Phatshoane Henny Attorneys Inc
	c/o Van de Wall Inc
For Respondents:	Adv J Olivier
	Bergh Kotze & Van Staden Inc
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