

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 109636/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: NO

DATE: 23 JUNE 2025

A black rectangular box redacting a signature.

In the matter between:

THE MINISTER OF WATER AND SANITATION

First Applicant

INKOMATI-USUTHU CATCHMENT MANAGEMENT AGENCY

Second Applicant

and

THE WATER TRIBUNAL

First Respondent

**MR MOKGALABONE, MEMBER OF THE
WATER TRIBUNAL N.O.**

Second Respondent

**LINDELWA MBANJWA, MEMBER OF THE
WATER TRIBUNAL N.O.**

Third Respondent

LEADAL INVESTMENT PROPERTIES (PTY) LTD

Fourth Respondent

Judgment

RUST, AJ

1. Before me is an opposed application in terms of Rule 53 of the Uniform Rules of Court, wherein the applicants seek an order in the following terms:
 - 1.1 Declaring the administrative action/judgment and paragraphs 1 and 2 of the order of the Water Tribunal under case number WT 03/204/MP, delivered on 1 June 2023, upholding the appeal by the fourth respondent, and setting aside the Directive issued by the second applicant on 9 April 2019, irrational, unlawful, invalid, and unconstitutional in terms of section 172(1) of the Constitution of the Republic of South Africa.
 - 1.2 Reviewing and setting aside the administrative action of the Tribunal.
 - 1.3 Remitting the matter for reconsideration by the Tribunal constituted by different members.
 - 1.4 An order which this Honourable Court deems just and equitable in the circumstances in terms of:
 - 1.4.1 section 1(c) of the Constitution;
 - 1.4.2 section 172(1)(b) of the Constitution;
 - 1.4.3 the common law;
 - 1.4.4 the principle of legality;
 - 1.4.5 the inherent discretion of this Honourable Court; and/or
 - 1.4.6 section 8(l)(c)(ii) of PAJA.
 - 1.5 Ordering the second and third respondents to pay the costs of this application in their personal capacity.
 - 1.6 Ordering that any of the respondents opposing this matter must pay costs.

Background

2. Having received a complaint in respect of a concrete boundary wall built by Leadal on the banks of the Rimmer's Creek, and after conducting a site inspection, the second applicant (herein referred to as "*Inkomati-Usuthu*") on 9 April 2019 issued a directive to the fourth respondent (herein referred to as "*Leadal*") in terms of section 53(1) of the National Water Act 36 of 1998 ("*NWA*") - "*for engaging in water use*

activities without authorisation at Portion 14 of the Farm Barberton Townlands 639 by Leadal Investments (Pty) Ltd” (“the Directive”).

3. Section 53(1) of the NWA empowers a responsible authority, by notice in writing to a person who contravenes (a) any provision of Chapter 4 of the NWA, (b) a requirement set or directive given by the responsible authority under this Chapter, or (c) a condition which applies to any authority to use water, to direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time specified in the notice or any other longer time allowed by the responsible authority.
4. Before the Directive was issued, Leadal repeatedly stated that the flow of the Rimmer’s Creek was diverted by the City of Mbombela Local Municipality when it erected a dam upstream in the river, and that Inkomati-Usuthu had, at a meeting held at the offices of Inkomati-Usuthu on 30 November 2018, conveyed to Leadal that the expert for Inkomati-Usuthu had arrived at a similar conclusion as that of Leadal’s engineer, namely that the Rimmer’s Creek had been diverted by the City of Mbombela Local Municipality. Leadal therefore consistently denied any contravention of the provisions of the NWA.
5. The Directive nevertheless states the reason for its issuance as follows:

“[1] the directive relates to contravention of the following sections of the NWA. Section 22(1) of the NWA states that a person may only use water without a licence if that water use is permissible as a continuation of an existing lawful use, or if that water use is permissible in terms of a general authorisation issued under section 39, or if the water use is authorised by a licence under this Act, or if the responsible authority has dispensed with a licence requirement under subsection 3.”
6. In paragraph 2 of the Directive, it is stated that a wall has been constructed within the floodline of the Rimmer’s Creek without authorisation, and that the following water uses were identified based upon observations made during the investigation, namely section 21(c) of the NWA: impeding or diverting the flow of water in a water

course, and section 21(i) of the NWA: altering the bed, banks, course or characteristics of a watercourse.

7. On 22 September 2020, Leadal launched an administrative appeal in terms of section 148(1)(j) of the NWA to the Water Tribunal under case number WT03/20/MP, relying on the following grounds of appeal:
 - 7.1 the Rimmer's Creek is not a watercourse as it is not a natural channel;
 - 7.2 Leadal does not require a water use license for the construction of a concrete wall on its premises;
 - 7.3 in constructing the concrete wall, all the regulatory requirements were complied with;
 - 7.4 the concrete wall was constructed before a licence was a requirement; and
 - 7.5 Leadal is entitled to use water without a water use license in terms of section 22(1)(a)(ii) of the NWA, as its water use constitutes an existing lawful water use which does not require a licence.

8. In an amended notice of appeal, Leadal relied upon the following additional grounds of appeal:
 - 8.1 The State Attorney lacked the authority to represent Inkomati-Usuthu;
 - 8.2 Inkomati-Usuthu was not authorised by an enabling statute to issue the Directive;
 - 8.3 The construction of the concrete wall did not constitute water use for the purposes of sections 21(c) or 21(i) of the NWA;
 - 8.4 The decision to issue a directive by Inkomati-Usuthu was not rationally connected with the purpose of the empowering provision and the information that was before Inkomati-Usuthu;
 - 8.5 The issuing of the Directive constituted an error of law;
 - 8.6 Inkomati-Usuthu failed to apply the principles of interpretation of statutes as set out in *Endumeni*;
 - 8.7 Inkomati-Usuthu took into account irrelevant considerations and failed to take into account relevant considerations in the issuance of the Directive, amongst

others the provisions of General Authorisation 1199 and General Authorisation 11982;

- 8.8 Inkomati-Usuthu failed to take into account the matter of *Great Fish River Irrigation Board v Southey* (Rooispruit) regarding the meaning of a channel;
 - 8.9 Inkomati-Usuthu failed to take into account the *ratio decidendi* in the matter of *Casserley v Stubbs* 1916 TPD 312 regarding the meaning of a channel;
 - 8.10 Inkomati-Usuthu failed to take into account that the definition of a watercourse does not refer to floodline in general, or to 1:100 floodline in particular;
 - 8.11 Inkomati-Usuthu failed to take into account the *ratio decidendi* in the matter of *Glaffer Investments v Minister of Water Affairs* 2000 (4) SA 822 (TPD) to high floodline;
 - 8.12 Inkomati-Usuthu failed to take into account that it only has powers and functions in terms of section 80 of the NWA and that it did not have the necessary assignment or delegation of powers, as a result of which the issuance of a directive was *ultra vires* its powers and functions;
 - 8.13 Inkomati-Usuthu failed to take into account the fact that the Rimmer's Creek was no longer a natural channel as a result of previous changes that were made to the channel at the place where the Leadal wall was built; and
 - 8.14 Inkomati-Usuthu erred in finding that water regularly or intermittently flowed in the Rimmer's Creek and that water no longer flows regularly or intermittently in the Rimmer's Creek.
9. Inkomati-Usuthu opposed the administrative appeal on the following grounds:
 - 9.1 The Rimmer's Creek is a watercourse as defined in section 1(1) of the NWA;
 - 9.2 The construction of a concrete wall within a 1:100-year floodline of the Rimmer's Creek constitutes water use as contemplated in sections 21(c) or 21(i) of the NWA;
 - 9.3 Leadal ought to have applied for a water use license in terms of section 40 of the NWA;
 - 9.4 The noted use which was the subject of the appeal took place after the NWA came into effect;

- 9.5 The water use activities engaged in by Leadal was in terms of sections 21(c) or 21(i) of the NWA;
 - 9.6 Leadal did not have water use authorisation or a licence; and
 - 9.7 The construction of a concrete wall within the floodline of the Rimmer's Creek does not constitute an existing lawful water use.
10. Following the submission of the appellants supplementary grounds of appeal, Inkomati-Usuthu filed the following supplementary grounds of opposition:
 - 10.1 General Authorisations 1198 and 1199 were not applicable;
 - 10.2 A floodline is an indicator of the extent of the watercourse, and no person is allowed to build within a floodline;
 - 10.3 The reliance on the authorities cited have been taken out of context and that such authorities do not support Leadal's case; and
 - 10.4 Inkomati-Usuthu acted in terms of the powers delegated to it in terms of section 75 of the NWA read together with the definition of a Water Management Institution. Thus, Inkomati-Usuthu did not act *ultra vires* nor did it act without the necessary authority.
 11. The hearing of evidence in the appeal before the Water Tribunal commenced on 18 August 2022 and concluded on 30 November 2022. Judgment of the Water Tribunal was handed down on 1 June 2023, in terms of which Leadal's appeal was upheld and the Directive of 9 April 2019 issued by Inkomati-Usuthu, was set aside with no order as to costs.
 12. Notably, the first applicant, the Minister of Water and Sanitation (herein referred to as "*the Minister*"), was not a party to the administrative appeal before the Water Tribunal and never participated therein.
 13. On 21 June 2023, Inkomati-Usuthu issued a notice of judicial appeal in terms of section 149(1)(a) of the NWA out of this Court under case number A187/23. Section 149(1)(a) of the NWA provides that a party to a matter in which the Water Tribunal

has given a decision on appeal under section 148, may, on a question of law, appeal to a High Court against that decision. Although that judicial appeal did not serve before me, counsel for Leadal pointed out that Inkomati-Usuthu did not prosecute this judicial appeal to finality.

14. On 24 October 2023, the Minister and Inkomati-Usuthu issued this review application against the decision of the Water Tribunal, and on 1 November 2023 served the application on the offices of Leadal's attorney of record.
15. The applicants rely on the following grounds for review:
 - 15.1 The administrative action by the Water Tribunal was materially influenced by an error of law, referring to the finding by the Water Tribunal that Inkomati-Usuthu bore the burden of proof.
 - 15.2 The administrative action by the Water Tribunal was materially influenced by an error of law, referring to the finding by the Water Tribunal that General Authorisation 1199 and General Authorisation 509 permitted Leadal to use water without applying for a water use license under the NWA.
 - 15.3 The administrative action by the Water Tribunal was materially influenced by an error of law, referring to the finding by the Water Tribunal that the Rimmer's Creek is more often than not without any running water and that the definition of a watercourse does not include the floodline or floodplain.
 - 15.4 The action of the Water Tribunal is not rationally connected to the information before the Water Tribunal, referring to the finding by the Water Tribunal that Inkomati-Usuthu conceded that the construction of the concrete wall by Leadal did not divert, alter or impede the Rimmer's Creek.
 - 15.5 The Water Tribunal took into account irrelevant considerations and ignored relevant considerations, relying heavily on an internal minute drafted by Shabangu which was not a report on the basis of which Inkomati-Usuthu relied to issue the Directive, while it failed to consider the investigation report conducted by the experts for Inkomati-Usuthu, which was the basis upon which the Directive was issued.

- 15.6 The administrative action of the Water Tribunal was biased or reasonably suspected of bias, referring to the decision of the Water Tribunal not to examine the evidence of Leadal, thereby not dealing with Leadal's main defence, while only assessing the evidence presented by Inkomati-Usuthu.
- 15.7 The decision of the Water Tribunal was so unreasonable that no reasonable person would have taken that decision, referring to the conclusion by the Water Tribunal that the Rimmer's Creek is not a watercourse and at the same time finding that Leadal was entitled to rely on General Authorisation 509 or General Authorisation 1199, and the finding that the definition of a watercourse does not include the floodline in light of the provisions of General Authorisations 509 and 1199, as flooding is one such characteristic feature of a watercourse.
- 15.8 The decision of the Water Tribunal was procedurally unfair, again referring to the finding of the Water Tribunal that Inkomati-Usuthu bore the burden of proof, while Inkomati-Usuthu was not afforded the opportunity at the hearing before the Water Tribunal to make oral submissions regarding who bore the burden of proof.
16. On 21 November 2023, Leadal's notice of intention to oppose was served on the Office of the State Attorney.
17. The 180-day period within which the judicial review had to be instituted in terms of section 7(1) of the PAJA, expired on 28 November 2023. The applicants never applied in terms of section 9 of the PAJA for the extension of the 180-day period contemplated in section 7 thereof.
18. On 16 April 2024, Leadal's attorney addressed a letter to the State Attorney, the Department of Water and Sanitation, Inkomati-Usuthu and to the Tribunal, requesting proof that the review application was served on the first, second and third respondents, and requesting that the record be dispatched. Subsequent to this letter, the application was served on the first, second and third respondents only on 27 May 2024.

19. On 14 June 2024, the 10 days within which the applicants had to deliver their supplementary notice and supplementary affidavit in terms of Rule 53(4) of the Uniform Rules of Court, expired. The applicants never supplemented their founding papers.
20. On 8 July 2024, Leadal served its opposing affidavit on the office of the State Attorney and on the Water Tribunal.
21. The time period for the delivery of the applicants' replying affidavit expired on 23 July 2024, and on 30 June 2024, the period for filing of the applicants' heads of argument expired, as the applicants failed to file any replying affidavit.
22. Heads of argument for the applicants were filed only on 24 May 2025, without any application to condone the late filing thereof. The applicants have therefore not complied with paragraph 25.1.1 of the Revised Consolidated Practice Directive 1 of 2024: Court Operations in Gauteng Division with effect from 26 February 2024 (as amended on 12 June 2024).
23. As a point of departure, I find it prudent to correct some misconceptions that emanated from this application.

The nature of an administrative appeal

24. An administrative appeal before the Water Tribunal is in the nature of a fresh hearing, or a hearing *de novo*, of the administrative decision that is the subject matter of the appeal.¹ It is therefore an appeal in the wide sense, that is, a complete reconsideration of, and fresh determination on the merits of the decision that is the subject matter of the appeal, with or without additional evidence or information, as if that decision is now for the first time considered to be made.

¹ See in this regard *South African Broadcasting Corporation v Transvaal Townships Board* 1953 4 SA 169 (T) 176F-H, where the Board had to deal with an appeal against the refusal of a so-called consent use by the local authority.

25. In the context of the application at hand, the subject matter of the appeal before the Water Tribunal was the decision by Inkomati-Usuthu made on 9 April 2019 to issue the Directive to Leadal in terms of section 53(1) of the NWA. The administrative appeal before the Water Tribunal therefore had to be the complete reconsideration of, and fresh determination on the merits of the decision to issue the Directive to Leadal, with or without additional evidence or information, as if Inkomati-Usuthu now for the first time considered whether or not to issue the Directive.
26. An application for judicial review on the other hand, is a limited re-hearing of the administrative decision that is the subject matter of the review, with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the power or discretion was exercised in a procedurally correct manner. This review application before me is therefore a limited re-hearing of the judgment of the Water Tribunal to determine, not whether the judgment of the Water Tribunal was correct or not, but whether the Water Tribunal's power or discretion was exercised in a procedurally correct manner.
27. The applicants' grounds of review are concerned with the finding by the Water Tribunal that Inkomati-Usuthu bore the 'burden of proof', or the 'onus of proof' before the Water Tribunal to provide the basis for issuing the Directive, and to prove that the wall built by Leadal contravenes the provisions of sections 21(c) and 21 (i) of the NWA. However, so the argument goes, had the Water Tribunal correctly applied the law, it ought to have found that Leadal firstly bore the onus of proof of authorisation for the identified water use, or to show cause why a directive should not be issued. Counsel for the applicants further submitted that a party who alleges that an administrative action constitutes an illegality, bears the burden of proof, or put differently, the onus or burden of proving facts that constitute an illegality, ordinarily rests on the applicant, the person who alleges the existence of the illegality. The Water Tribunal allegedly impermissibly shifted the burden of proof to Inkomati-Usuthu while it should have found that Leadal failed to discharge its 'onus of proof'.

28. The formal or traditional sense of the concept of 'onus of proof' was explained in *South Cape Corporation*² as consisting of two distinct concepts, namely either (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying a court of law that he is entitled to succeed on his claim or defence, as the case may be; or (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Traditionally these concepts are part of the law of evidence and procedure, operating within the context of an adversarial procedure in a court of law.
29. There is a fundamental difference between the adversarial nature of judicial proceedings and the inquisitorial nature of administrative appeal proceedings before the Water Tribunal, which is a specialist tribunal and not an ordinary court of law nor can the Water Tribunal be compared to an ordinary court of law in this regard.
30. In respect of administrative proceedings, the Supreme Court of Appeal in *Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Ltd*³ stated in this regard as follows:

“ *The so-called onus of proof.*
In my view the expression 'onus of proof' is apt to be misleading in regard to proceedings before a local board and the Commission. In civil proceedings that expression has a recognised connotation, and the onus is fixed by the pleadings, and the latter govern the evidence which is led. These considerations do not apply in proceedings before a local board and the Commission, which are not bound by rules of judicial procedures; see, with special reference to the Commission, the concluding paragraph under the heading: 'The constitution and function of local boards and the Commission', supra.
In proceedings before those bodies sec. 13(1) of Act 39 of 1930 requires publication of an application, so that interested parties may object. Regs. 4 and 5 provide how the application is to be made and published. Sec. 13(3) of the Act prohibits the issue of a certificate if, in the opinion of the board, existing facilities are satisfactory and sufficient. If that prohibition is surmounted, there

² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) at 548A.

³ 1976 1 SA 887 (A) 903H-904C (per Holmes JA).

is a list of factors which the board 'shall take into consideration'; see sec. 13 (2).

The most that can be said is that an applicant should place before the board relevant facts in favour of his application; and an objector (e.g., an existing operator who invokes sec. 13 (3)) should place before the board relevant facts in support of his objection. After due hearing, the local board comes to its opinion."

31. Although this case dealt with specific statutory tribunals, namely the National Transport Commission and a Local Road Transportation Board, established in terms of the Motor Carrier Transportation Act 39 of 1930, the *dictum* therein is of general application⁴ and equally applicable to administrative appeal proceedings. The Water Tribunal is also not bound by rules of judicial procedure but is free to make its own rules regulating its procedures and proceedings, and there is also no set of pleadings in terms of which an onus is fixed, which in turn governs the evidence which is led.
32. The description by Holmes JA in the aforesaid *David Morton Transport*-case of the duties or responsibilities of an appellant or a respondent in this kind of administrative proceedings, is also applicable to an administrative appeal before the Water Tribunal: the decision-maker of the impugned decision should place before the Water Tribunal relevant facts in favour of its decision, and the objector to that decision should place before the Water Tribunal relevant facts in support of its objection.
33. Section 148(4) of the NWA, read with Schedule 6 Part 2 item 6 thereof, confirms this procedure for the hearing of appeals by the Water Tribunal. Item 6(3) specifically provides as follows:

⁴ See also Baxter *Administrative Law* (1984) 249-250; *Connan v Sekretaris van Binnelandse Inkomste* 1973 4 SA 197 (NC) 202D:

"Mnr. Steenkamp moet dan na my mening gelyk gegee word dat in 'n appél soos die onderhawige daar nie juis sprake van 'n bewyslas is nie. Vgl. Tikly se saak, supra; Gani Mohamed (Pty.) Ltd. v Johannesburg, N.O. and Others, 1964 (1) SA 584 (T) te bl. 589A-C.; Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery (Edms.) Bpk. en 'n Ander, 1969 (1) SA 260 (AA) te bl. 264."

“Appeals and applications to the Tribunal take the form of a rehearing. The Tribunal may receive evidence, and must give the appellant or applicant and every party opposing the appeal or application an opportunity to present their case.”

34. If the legislature wanted to introduce an onus of proof, in the traditional sense, it could easily have done so but instead it elected to introduce only the duty or responsibility to state a case and adduce evidence in support thereof. There is therefore no legal basis for the recognition of the concept of ‘onus of proof’ in the formal sense as far as an administrative appeal before the Water Tribunal is concerned.
35. Evidence, if accepted and believed, may result in proof, but is not necessarily proof in itself.⁵ Evidence is the matter or material which may be lawfully placed before the Water Tribunal in order to prove the facts in issue. It may include various matters or different materials, including documents in writing as well as legitimate inferences from facts and circumstances and also presumptions of law. In short, any matter legitimately usable, which tends to establish the truth or falsity of a fact in issue.
36. Wigmore⁶ defines evidence as follows:

*“It is of little practical consequence to construct a formula defining what is to be understood as Evidence. Nevertheless, its content is capable of being stated. What we are concerned with is the process of presenting evidence for the purpose of demonstrating an asserted fact. In this process, then, the term evidence represents:
Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered to a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.”*

⁵ See Claassen *Dictionary of Legal Words and Phrases: Volume 2 (D-I)* (1997) E-41 in respect of evidence.

⁶ Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Volume 1* (1940) 3.

37. Section 148(4) of the NWA, read with Schedule 6 Part 2 item 6 thereof, requires no special formality for any relevant matter or material to be regarded as evidence before the Water Tribunal. It is also not a requirement that any matter, information or material only becomes evidence before the Water Tribunal if it is confirmed under oath.⁷
38. The Water Tribunal therefore correctly found that Inkomati-Usuthu had to place evidence before the Tribunal to support its decision to issue the Directive, therefore to prove that the wall built by Leadal contravenes the provisions of sections 21(c) and (i) of the NWA.
39. Only the fourth respondent (“*Leada*”) opposed this review application, and the following points *in limine* were raised in its opposition:
- 39.1 The review was not brought without unreasonable delay within the 180-days provided for in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (“*PAJA*”).
- 39.2 The first applicant has no *locus standi* as the Minister did not issue the Directive, the Minister was not a party to the administrative appeal before the Water Tribunal and never participated therein, and the Minister did not seek leave of the Court to intervene by means of an application for joinder, intervention or appointment as *amicus curiae*.
- 39.3 The issue of *lis alibi pendens*, as the second applicant’s judicial appeal in terms of section 149(1)(a) of the NWA in this Court under case number A187/23 remains pending.

⁷ In *S v Mia* 1962 2 SA 720 (N) it was held that the word ‘evidence’ does not necessarily suggest oral testimony given under oath; the word may be, and is, often used to connote other means by which a court is informed of facts which are relevant to the issue before it.

Was the review brought without unreasonable delay?

40. It is not in dispute that the judgment of the Water Tribunal was handed down on 1 June 2023, that this review application was served on the fourth respondent on 1 November 2023, that the application was served on the first, second and third respondents only on 27 May 2024 – some 361 days after the judgment of the Water Tribunal was handed down, and that the applicants have not applied for extension of the 180-day period contemplated in section 7 of the PAJA.
41. Section 7(1) of the PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay, but in any event not later than 180 days after an internal remedy has been exhausted. This however does not mean that a litigant has the leisure of 180 days within which to institute proceedings.
42. In a unanimous decision of the Supreme Court of Appeal⁸, the word 'institute' in section 7(1) of the PAJA is clarified as follows:

" ... Taking as one's logical point of departure, the requirement in s 7(1) that 'any proceedings for judicial review . . . must be instituted without unreasonable delay and not later than 180 days' after either of the dates referred to in paragraphs (a) and (b) of s 7(1), it must ineluctably follow that the word 'institute' when considered contextually and purposively, as it must be, means to commence the review proceedings by issuing the process and effecting service thereof on the decision-maker whose administrative action is impugned."
43. In *Finishing Touch*⁹ the Supreme Court of Appeal interpreted the word 'initiate' (as used in a court order granting an interim interdict pending certain review proceedings to be initiated by no later than a certain date), to mean not only the filing of the review application papers with the registrar and the issue thereof, but crucially also service thereof on all of the respondents cited.

⁸ *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56 at par [33].

⁹ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) par [14] - [20].

44. Rule 53(1) of the Uniform Rules of Court furthermore provides that proceedings for the review of a decision of any tribunal (amongst decision-makers), shall be “*by way of notice of motion directed and delivered by the party seeking to review such decision*”, calling on all affected persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside.
45. Rule 1 defines “*deliver*” to mean “*serve copies on all parties and file the original with the registrar*”. The review application may therefore only be regarded to be ‘instituted’ once service thereof was effected on all parties, and in particular on the decision-maker whose administrative action is impugned.
46. The Supreme Court of Appeal in *OUTA*¹⁰ held that section 7 of the PAJA creates a presumption that a delay of longer than 180 days is “*per se unreasonable*”:

“At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned . . . Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been ‘validated’ by the delay.....”

47. Therefore, before the effluxion of 180 days, the applicants had to comply with section 9(1)(b) of the PAJA, either by reaching an agreement with the respondents for an extension of the 180 day period, or failing such an agreement, by applying to the Court for such extension. However, during the 180-day period, the applicants

¹⁰ *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd* 2013 (4) All SA 639 (SCA) (OUTA) par 26, which was endorsed by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (Asla Construction) 2019 (6) BCLR 661 (CC) at par [49].

did not approach the respondents for an agreement to extend the 180-day period, and they did not apply to this Court under section 9(1)(b) of the PAJA for the extension of the prescribed 180-day period within which they had to institute this application. In the result, the applicants already failed at the first enquiry contemplated by the Supreme Court of Appeal, as it is not in dispute that this application was initiated after the effluxion of 180 days.

48. After the 180-day period, the issue of unreasonableness is pre-determined by the legislature: it is unreasonable *per se*. The applicants are thus faced with a presumption that their delay in bringing the review application, which exceeded the 180-day limit, is unreasonable. In such circumstances, when faced with an application for extension of the 180-day period, a court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9 of the PAJA. Absent such application for extension, this Court has no authority to entertain the review application at all.¹¹
49. Had the applicants applied for such extension as contemplated in section 9(1)(b) of the PAJA, the question whether a court in the interests of justice should condone an applicant's delay, was answered by the Supreme Court of Appeal in *Camps Bay Ratepayers*¹² as follows:

"[A]nd the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

¹¹ *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited supra* at par [42].

¹² *Camps Bay Ratepayers and Residents Association v Harrison* [2010] 2 All SA 519 (SCA) par 54 (Footnotes omitted).

50. Having failed to apply for an extension as contemplated in section 9(1)(b) of the PAJA, the applicants in any event failed to satisfy both the first and second legs of the enquiry contemplated by the Supreme Court of Appeal, in that they failed to furnish "*a full and reasonable explanation for the delay which covers the entire duration*" of the period of 180 days within which it had to institute its review application, and the period from 28 November 2023 - when the 180 days expired, to 27 May 2024 - when the review application was served on the first, second and third respondents
51. The applicants' reliance on the Constitution, the common law, the principle of legality, or the inherent discretion of this Court to make an order that is just and equitable does not provide any assistance in respect of its undue delay in instituting this review application. State respondents, just like any other litigant, are bound by the statutory prescribed time frames in the PAJA, and there is no reason to exempt government therefrom.¹³ There is rather a higher duty on the State to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.
52. In the result, I find that the applicants' delay in instituting this review application, which by far exceeded the 180-day limit, was unreasonable *per se*, the impugned decision of the Water Tribunal is 'validated' by the applicants' delay, and this Court has no authority to enter into the substantive merits of the review, or to entertain the review application at all.
53. The first point *in limine* is therefore upheld.
54. Since the first point *in limine* is upheld, it serves no purpose to belabour the remaining points *in limine*, or the merits of the review application any further.

¹³ *MEC for Health, EC v Kirkland Investments* 2014 (3) SA 481 (CC) par [82].

Costs

55. There is no merit whatsoever in the applicants' contention that the second and third respondents should pay the costs of this application in their personal capacity.
56. The conduct of the applicants are evidence thereof that the applicants do not regard the Uniform Rules of Court or the Practice Directives of this Court as binding on them. This Court must show its displeasure with such conduct in the hope that the applicants will be prevented from persisting with its dismissive and lackadaisical approach to litigation in this Court. Such conduct warrants a punitive cost order against the applicants.

Order

57. I make the following order:
 1. The first point *in limine* is upheld.
 2. The application to review and set aside the judgment and order of the Water Tribunal under case number WT 03/204/MP, delivered on 1 June 2023, is dismissed.
 3. The first and second applicants are ordered to pay, jointly and severally, the one to pay the other to be absolved, the costs of the application on the scale as between attorney and client.

Appearances:

For the Applicants: Mr Malatji
 Applicants' Counsel

Instructed by:
 MW Motsepe
 State Attorney, Pretoria

For the Fourth Respondent: Mr JHA Saunders
Respondent's Counsel

Instructed by:
W Hertz
WDT Attorneys
Pretoria