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20/12/2017



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

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MIDDLEBURG]

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>20 11 2017</u> DATE	
<u>[Signature]</u> SIGNATURE	

CASE NUMBER 391/2017

QUANTUM LEAP INVESTMENTS 639 (PTY) LTD  
Registration number: 2002/025182/07

1<sup>ST</sup> APPLICANT

HAASFONTEIN BELEGGINGS (PTY) LTD  
Registration number: 2003/006055/07

2<sup>ND</sup> APPLICANT

And

MINISTER OF WATER AND SANITATION

1<sup>ST</sup> RESPONDENT

LUYOYO LAWRENCE NQELENGA

2<sup>ND</sup> RESPONDENT

D MABADA DIRECTOR REGULATION:  
DEPARTMENT OF WATER AND SANITATION

3<sup>RD</sup> RESPONDENT

N MABE

4<sup>TH</sup> RESPONDENT

SPRINGBOKDRAAI BOERDERY (PTY) LTD  
Registration number: 2001/01807/07

5<sup>TH</sup> RESPONDENT

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JUDGMENT

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LEGODI JP

[1] The erection of weirs by the second applicant, Haasfontein Beleggings (Pty) Ltd in the Water River and Kolspruit and thus preventing the flow of water to the fifth respondent, Springbokdraai Boerdery (Pty) Ltd followed by a complaint lodged by the latter with the Department of Water and Sanitation and subsequent directive issued by the Department in terms of which: (a) second applicant was directed to cease all water use activity with immediate effect and provide proof of cessation to the Department within five working days upon receipt of the directive; (b) to appoint independent environmental consultant to assess the impact and compile rehabilitation plan to be submitted to the Department within 30 days of approval and (c) to implement all the recommendations contained in the submitted rehabilitation plan in all the areas affected by erected walls, prompted the present application.

[2] At the heart of the dispute is the constitutionality of section 148 (2) of the National Water Act No. 36 of 1998 which provides as follows:

"(2) *An appeal under subsection (1)*

(a) *does not suspend a directive given under section 19(3); 20(4)(a) or 53(1) and*

(b) *suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation pending disposal of the appeal, unless the Minister directs otherwise*".

[3] The directive referred to in paragraph (a) above for the present case, is said to be a directive as contemplated in section 53(1) which provides that a responsible authority may, by notice in writing to a person who contravenes-



- (a) *any provision of Chapter 4 of the Act;*
  - (b) *a requirement of Act or directive given by the responsible functionary under Chapter 4; or*
  - (c) *a condition which applies to any authority to use water, direct that person, or other owner of property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.*
- (2) *If the action within the time specified in the notice, or any longer time allowed, the responsible authority may-*
- (a) *carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or*
  - (b) *apply to a competent court for appropriate relief."*

[4] The directive against which the applicants complained and prompted the present application was issued on 12 February 2016 and of relevance, reads as follows:

1. *"Cease all water use activity with immediate effect and provide proof of cessation to DWS within 5 (five) working days after receipt of this directive.*
2. *Appoint an independent environmental consultant to assess the impact by erected wall within the water resources and compile rehabilitation plan. The rehabilitation plan must entail amongst others the nature and extent of the impact that the water use activity may have on the environment and measures that will be implemented by remediate or mitigate the impacts with clear time frames and description of how each remediation or mitigation action will be implemented. Submit the rehabilitation plan and ground water monitoring programme to DWS for approval within 30 working days.*
3. *Implement at the recommendations contained in the submitted rehabilitation plan in all areas affected by erected walls".*

[5] The essence of the present application is that section 148 (2) quoted above is unconstitutional because an appeal to the Water Tribunal against the directive issued



by the Department in terms of section 53(1) of the Act, does not suspend the operation thereof. The grounds of unconstitutionality, of importance, is the alleged infringement of rights entrenched in sections 25, 33 and 34 of the Constitution.

[6] I must immediately say that I had difficulties in understanding the essence of the applicants' argument on the unconstitutionality of section 148(2) of the Act, particularly if one was to have regard to section 27 of the Constitution read together with the object of the National Water Act seen in the context of Chapter 4 thereof.

[7] As a start, section 27 (1) (b) of the Constitution entitles every person the right to have access to sufficient water. It entitles every person to be able to have water for their daily needs and general use. In terms of subsection (2) of section 27 of the Constitution, state is obliged to take responsible legislative and other measures within its available resources to achieve the progressive realisation as contemplated in the Constitution.

[8] National Water Act is therefore the product of constitutional imperative. As a prelude to the use of water, Chapter 4 of the National Water Act states: *'As this Act is founded on the principle that National Government has overall responsibility for and authority over water resources management, including the equitable allocation and beneficial use of water in the public interest, a person can only be entitled to use water if it is permissible under the Act...'*

[9] In Part 1 of Chapter 4 which regulates general principles applicable to use of water, is stated as follows: *"water use is defined broadly, and includes taking and storing water activities which reduce stream flow, waste discharge and disposals, controlled activities (activities which impact detrimentally on a water resource), altering a water course, removing water found underground for certain purposes and recreation. In general a water use must be licensed unless it is listed in Schedule 1 as an existing lawful use, is permissible under a general authorisation, or if a responsible authority waived the need for a licence..."*



[10] For the purpose of the Act, use of water includes – (a) taking water from a water use; (b) storing water; and (c) impeding or diverting the flow of water in water course. The second applicant was found to have engaged itself in unlawful use of water contrary to the provisions as quoted in paragraph [3] of this judgment read with the quotation under paragraph [36] hereunder, something which in my view, the Department was entitled to do in terms of its legislative mandate and authority under the Act.

#### Alleged infringement of a right in section 25 of the Constitution

[11] Section 25 of the Constitution protects every person against deprivation of property, except in terms of law of general application and that no law may permit arbitrary deprivation of property. Then in paragraph 42.1 of the founding affidavit the applicants postulate their cause of action as follows:

*“...The applicants contend that the second applicant is using water in terms of the various General Authorisation published by the first respondent in the Government Gazette in terms of the provisions of section 39 (1) of the NWA and the second applicant is therefore entitled to use water in terms of the provisions of section 22 (1)(a)(iii) of the NWA, read with the provisions of the above mentioned General Authorisation.”*

[12] Insofar as the contention is made under the topic titled: “NWA INFRINGES ON THE APPLICANT’S RIGHT TO PROPERTY”, as contemplated in section 25(1) of the Constitution, I am at a loss as to what right of ownership are the applicants seeking to assert. This seems to be a novel argument conflated with the right to water as contemplated in section 27 of the Constitution referred to earlier in this judgment. One needs to be reminded of the fact that water is a shared use that no one can claim ownership particularly on the facts of the present case.

[13] The argument that the second applicant is therefore entitled to use water in terms of the provisions of section 22 (1)(a)(iii) of the NWA, also seems to be a contention misplaced. Section 22 referred to in the quotation deals with permissible water use. For example, paragraph (a)(iii) thereof provides that a person may only use water – if that water use is permissible in terms of a general authorisation issued under section





39. Subsection (1) of section 39 provides that a responsible authority may, subject to Schedule 1, by notice in the Gazette-

- (a) generally;
- (b) in relation to a specific water resource; or
- (c) within an area specified in the notice,

*authorise all or any category of persons to use water, subject to any regulation made under section 26 and any conditions imposed under section 29".*

[14] How what is stated above can be seen as coming close to deprivation of ownership to water, boggles one's mind. Then in paragraph 42.5 of the applicant's written heads a further argument is made as follows:

*"It must be further kept in mind that the structure in the Waterval River, of which the fifth respondent complains, has been partially washed away and that it does not have an influence on the flow in the Waterval River since 18 March 2016, and that the weir was not subsequently repaired".*

[15] This appears to be an admission of erection of weir without authority and as it made, it has nothing to do with deprivation of right to ownership as contemplated in section 25 of the Constitution. *"The extent of the deprivation in respect of the property of the first applicant and farming operations of the second applicant would be devastating, while if the situation that existed, which is clearly evident from supplementary affidavit that is attached into the papers, which entails the purpose of the deprivation, is also totally out of balance which situation favour the applicants"*, as contended in paragraph 42.9 of the written heads of argument, seems to turn a blind eye on the wrongfulness of the use of water through the means adopted by the applicants. Secondly, the applicants seem to ignore the right of the fifth respondent to use water from the stream or river aforesaid shared in use with the applicants. "Totally out of balance", should be seen in relation to the interest of the fifth respondent which cannot be seen as deprivation of ownership right. There is just no merit to the point raised with regard to the alleged contravention of section 25 of the Constitution. The applicants did not contend that their right to the use of water as contemplated in



section 27 of the Constitution has been infringed. In my view, even if they did, they would have had no leg to stand on. Their right to access water has to be lawful and within limits, where applicable.

Alleged infringement of section 34 of the Constitution.

[16] Similarly, I had difficulties in understanding the logic of the contention on this point. Section 34 of the Constitution affords every person the right to have access to courts. The issue is introduced *inter alia*, as follows in the written heads of argument:

*"27. By providing a special statutory remedy in section 148(1)(i), a recipient of a directive in terms of section 53(1) of the NWA, the legislature has confined the recipient of a directive in terms of the last mentioned section to a particular remedy, and therefore the recipient of the directive has no further legal remedy."*

[17] This contention in my view, is a reflection of a clear wrong route which was relentlessly pursued during oral argument. The meritless of the contention will appear much clearer when dealing with the alleged infringement of a right under section 33. It suffices for now to mention that exhaustion of internal remedies as envisaged in section 7 of Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) provides that no court or tribunal shall review an administrative action or decision, unless any internal remedy provided for in any other law has been exhausted<sup>1</sup>. In my view, this is fatal to the argument. If this provision is constitutional, nothing can be unconstitutional under section 148(2) of the Water Act.

[18] The point is simply this: Internal remedy has been created under National Water Act, that is, an appeal to the Tribunal. So, anyone who feels that harm is likely to occur by having to wait for the outcome of the internal appeal, there can be no impediment to approaching the court, provided of course it is shown that it is in the interest of justice to do so. *'A court or tribunal may, in exceptional circumstance and on*

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<sup>1</sup> Section 7(2)(a) of PAJA





application by a person concerned, exempt such person from obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice<sup>2</sup>.

[20] The contention that 'When read together the provisions of section 148 (2) (a), 148(1) (j) of the NWA and section 7(2) of PAJA, leaves the applicants with no recourse whatsoever. The provisions of section 148(2)(a) of the NWA does not even grant a discretion to the first respondent to direct that an appeal under section 148 (1) of the NWA suspends a directive given in terms of section 53(1) of the NWA, although that discretion is given to the first respondent in terms of section 148(2)(b) of the NWA with regard to any other decision, direction, requirement, limitation, prohibition or allocation made in terms of the NWA', has no merit.

[21] Assuming that the contention is correct, section 7(2) of PAJA quoted in paragraph [19] above, seems to open a way for the aggrieved party to approach the High Court or Tribunal provided:

- (a) an application for exemption to exhaust internal remedy is made;
- (b) exceptional circumstance are shown; and
- (c) it is in the interest of justice'.

[22] In addition, there can be no reason not to approach the court in the form of an interlocutory application for the suspension of the directive as contemplated in section 53 (a)(c) provided, as I said, facts set out in paragraph [21] above, are established.

[23] I also do not think that the Tribunal will be disentitled to hear an application for the suspension of the directive under paragraph (a) of section 148 (2) until the appeal before it is finalised. The approach to the Tribunal is so contemplated in section 7(2) insofar as one is dealing with an administrative action.

[24] Lastly, reference to the Minister made under paragraph (b) of section 148 (2) quoted in paragraph (2) of this judgment, raises, in my view, the question whether it is only limited to paragraph (b) or to both paragraphs (a) and (b) of section 148 (2). The

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<sup>2</sup> Paragraph (c) subsection (2) of section 7 of PAJA





"and" between (a) and (b) raises the question whether; "*unless the Minister directs otherwise*", is also applicable to paragraph (a). If the Minister in terms of paragraph (b) is entitled to intervene by suspending the operation of the decision, direction, requirement, limitation, prohibition or allocation pending disposal of the appeal, why cannot he have the same power under paragraph (a) of section 148(2)? I do not have to make a final determination in this regard as counsel for the respondent seemed to have contended that the Minister is not entitled to intervene under paragraph (a). In fact, in the written heads, a concession seems to be that the Minister is not entitled to intervene. As I said, I do not agree, but I make no final determination.

[25] I do not think that section 149 of the Water Act can be ignored insofar as it relates to the alleged infringement of right of access to courts. Subsection (1) thereof provides that a party to a matter in which the water Tribunal- (a) has given a decision under section 148, may on a question of law appeal to a High Court. This clearly is not deprivation of right of access to courts under section 148. I therefore find that there is no merit to the constitutional point raised under section 34 of the Constitution.

#### Alleged infringement of access to administrative action

[26] The issue is introduced as follows in the applicants' written heads of argument:

"45 *The directive, read with the provisions of section 148(2) (a) further militates against the applicants' right to just administrative action for the following reasons:*

##### 45.1 *The directive provides as follows:*

45.1.1 *Cease all water use activity with immediate effect and provide proof of a cessation to DWS within 5 (five) working days after the receipt of the directive;*

45.1.2 *Appoint an independent environmental consultant to assess the impact caused by erected wall was in the water resource and compile a rehabilitation plan. The rehabilitation plan must entail*



*amongst others the nature and extent of the impact that the water use activity may have on the environment and measures that will be implemented to remediate or mitigate the impacts with clear timeframes and a description of how each remediation/mitigation action will be implemented. Submit the rehabilitation plan and the groundwater monitoring program to DWS for approval within 30 working days.*

*45.1.3 Implement all the recommendations contained in the submitted rehabilitation plan in all the areas affected by erected walls."*

[27] Then in paragraph 45.3 of the written heads the applicants contended as follows: *"The directive therefore directs the applicants to immediately stop taking water from the water resource and to immediately stop taking water from the flow of water course and to cease altering the bed, banks, course or characteristics of a watercourse".*

[28] As a clarity, cessation of 'all water use activity' was limited only to the use of water in relation to prohibited activity. That is, an activity without a permit like erection of weirs and thus affecting flow and use of water to the fifth respondent. In addition, the background necessary to bring to the fore, is alluded to in paragraphs [38], [39] and [40] hereunder.

[29] Paragraphs 45.5 to 45.8 of the written heads are couched as follows:

*"45.5 The effect of complying with the directive will be that the second applicant must cease its abstraction of water and that the erected wall/walls should be removed and rehabilitated.*

*45.6 Not only does the directive directs the second applicant to stop abstracting water but the necessary implication is that the erected wall/walls should be removed by the first applicant and the area rehabilitated, as these wall/walls allegedly impede or direct the flow of water in a water course and these*





*wall/walls are altering the bed, banks, course or characteristics of a watercourse.*

45.7 *This the applicants must do even before their appeal has been heard for the reasons that has already been set out above.*

45.8 *The exercise of public power must comply with the Constitution, which is the supreme law, and the doctrine of illegality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."*

[30] Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. For anyone who seeks to assert his right to challenge an administration action or decision by a functionary or the state, should be entitled to do so cheaply, expeditiously in accordance with a procedure that is fair and with less red tapes.

[31] Section 7 of the PAJA read together with the appeal process under Water Act which deals with procedure for judicial review, seems to aim at ensuring that this constitutional imperative is adhered to. For example, subsection (1) thereof provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which internal remedy has been concluded or after a date on which a person affected by the decision or administrative action became aware of the action and the reasons for it or might reasonably have been expected to become aware of the action and the reasons<sup>3</sup>.

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<sup>3</sup> See paragraph (a) and (b) of subsection 1 of section 7 of PAJA



[32] So, the suggestion that *'by issuing a directive, deciding that it is not complied with, and seeking to enforce such a directive, the first respondent and or her officials becomes a judge and jury and executioner with regard to the compliance with that directive which is administrative action'*, as contended in paragraph 45.15 of the written heads, without more, the constitutionality of the review process under section 6 of PAJA and the procedure to be followed under section 7, in my view, makes the contention pointless as is without any legal basis. The procedure under section 7 of PAJA has for many years proved its benefit as it is, fair, cheap and speedy. Any aggrieved party under internal recourse is entitled to challenge the ruling given under the internal review process.

[33] To say, *'section 148 (2)(a) of the NWA infringes upon the applicant's rights to just administrative action, as the administrative action does not comply with the rule of law and the privileges of legality that forms the basis of our constitutional dispensation', in my view is without merits', is also baseless.* Earlier in this judgment, I dealt with the alleged unconstitutionality of section 148(2)(a) when dealing with alleged infringement of access to courts under section 34 of the Constitution.

[34] I am unable to understand why the Department can be said to be flouting the rule of law and the principle of legality when it acts in accordance with the legislative frame work, that is, the Water Act read together with other competing constitutional rights more relevantly rights in terms of section 27 of the Constitution. Everyone has the right of access to sufficient water<sup>4</sup>. The state is in terms of subsection (2) of section 27 obliged to take reasonable legislative and other measures– to achieve the progressive realisation of each of these rights.

[35] To see acting contrary to the rule of law and contrary to the Constitution imperative envisaged in section 33 when the first respondent exercises its legislative authority in terms of the Act rationally and reasonably by ensuring that the conduct of the applicants contrary to the legislative framework, is brought to an end, in my view, will be tantamount to allowing the applicants to take the law into their own hands. They need to be stopped in their course. The first respondent, (the Department) when it

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<sup>4</sup> Paragraph (b) of subsection 9(1) of section 27 of the Constitution





employs measures as it is so obliged to do, to stop and direct the applicants to correct the wrong, it cannot be said it is flouting the rule of law and human rights entrenched in the Constitution. The challenge to the constitutionality of section 148(2) insofar as it is suggested that it offends against section 33 of the Constitution is also destined to be rejected.

Interdict relief as per prayer 2 of the notice of motion

[36] Paragraph 2 of the notice of motion reads:

*"Interdicting the first, second, third and fourth respondents from entering portion4, (Broederstroom) (a portion of portion2), of the farm Salpeterkranz 351, Registration Division IR, in the Mpumalanga Province, in order to carry out any work, pending the finalisation of the appeal that was lodged in the Water Tribunal."*

[37] This relief is clearly directed at the Department (first respondent). It has to be seen in context. Section 53(2) of the Water Act, provides that if the action is not taken within the time specified in the notice containing the directive as contemplated in subsection (1) of section 53 or any other longer time allowed, the responsible authority may- (a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the



person on whom the notice was served or; (b) apply to a competent court for appropriate relief.

[38] Before the institution of the present proceedings, the fifth respondent (Springbooddraai Boerdery (Pty) Ltd was forced to bring an urgent application against the applicants in the present proceedings in terms of which *inter alia*, it wanted the court to order the applicants to cease all water use activities resulting in the building weir or wall and or collection of water and use of water for purposes of irrigation in Waterval River on remaining Extent of Portion 2 Klipfontein 357 1,2 and Remaining Extent of Portion 4 Sslpryrtktsnd 351 IR, with immediate effect and that they be ordered to demolish and remove a weir constructed and erected across the Waterval River on the portion of the land aforesaid. Furthermore, insofar as it is relevant, they also wanted the court to order the applicants to rehabilitate the water recourse insofar as the contravention and usage of the weir has affected the environment and disturbed the surface thereof. Mabuse J on 7 September 2016 granted the order.

[39] When the applicants did not comply with the order aforesaid, the fifth respondent had to approach the court again and on 02 November 2016 and Bam J made an order against the applicants as follows:

*"PART A*

- 1. The application is found to be urgent.*
- 2. 2.1 The sheriff of the District of Leandra is requested and authorized, within 14 days of this order, after having established that it exist, (with the assistance of a contractor supplied by the applicant) to remove and demolish the obstruction in the Waterval River at the remaining extent of portion 4 (Broederstroom, a portion of Portion 2) of the farm Salpeterkrantz 351, registration Division IR, and the remaining extent of Portion 2 Klipfontein 357 IR, to allow for all water forming part of the natural water course of the Waterval River to freely flow past the first and second respondent's properties.*





2.2 The issue about the costs of the removal of the obstruction is postponed *sine die*. Anyone of the parties, after execution of the order in 2.1 may approach this court on the same papers for the adjudication of that issue.

3. Costs of this application are reserved. Anyone of the parties, after execution of the order in 2.1 above, may approach this court on the same papers for the adjudication of the costs issue.

#### PART B

##### 1. Postponed *sine die*."

[40] The proceedings before Mabuse J and Bam J should also be seen in this context. Both the second applicant and the fifth respondent conduct farming activities and they are both dependant on the Waterval River for irrigation. The farms are adjacent to each other with the fifth respondent's farm situated downstream to that of the second applicant. As a result of the weirs constructed by the second applicant, the fifth respondent could not irrigate its crops due to the obstruction of the free flow of water downstream to its property.

[40] Section 125 of Natural Water Act is very instructive on the issue. It deals with powers and duty of authorised persons and it *inter alia*, provides: 'An authorised person may, at any reasonable time and without prior notice enter or cross a property with the necessary persons, vehicles, equipment to carry out routine inspections of the use of water under any authorisation'<sup>5</sup>.

[41] This is what the applicants seek to avoid as per their relief sought and quoted in paragraph 36 of this judgment. That, they cannot do until the provisions of section 125(1) is nullified. Furthermore, the applicants seek to render the order made by Bam J as quoted in paragraph [39] of this judgment academic. Any order compelling the Department or its authorised persons not to at any reasonable time and without prior notice enter or cross a property with the necessary persons, vehicles, equipment to

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<sup>5</sup> Subsection (1) of section 125 of Water Act



carry out routine inspections of the use of water under any authorisation would be contrary to the rule of law as it would seek to render the provisions of section 125(1) ineffective. But even most importantly, it will frustrate paragraph 2.2.1 of the order by Bam J quoted in paragraph [36] of this judgment. Therefore the relief sought in paragraph 2 of the notice of motion is also destined to fail.

[42] Consequently an order is hereby made as follows:

42.1 The application is hereby dismissed with costs, such costs to include the costs of three counsel for the first, second and third respondents.

  
**M F LEGODI**  
**JUDGE OF THE HIGH COURT**

DATE OF HEARING:  
DATE OF JUDGMENT:

21 NOVEMBER 2017  
20 DECEMBER 2017

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