IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 230/12

and CASE NO: 233/12

Reportable

In the matter between:

ATWELL SIBUSISO MAKHANYA NO	**FIRST APPELLANT**
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**SECOND APPELLANT**

and

GOEDE WELLINGTON BOERDERY (PTY) LTD	**RESPONDENT**

Neutral Citation:	*Makhanya v Goede Wellington Boerdery (Pty) Ltd* (230/12) [2012] ZASCA 205 (30 November 2012)
Coram:	HEHER, BOSIELO, TSHIQI and THERON JJA and ERASMUS AJA
Heard:	**5 November 2012**
Delivered:	**30 November 2012**

Summary: **Administrative Law – whether the decision taken by the Water Tribunal in refusing an appeal against a decision of the Chief Director rejecting an application for a water licence constitutes administrative action reviewable under the Promotion of Administrative Justice Act 3 of 2000 – whether it was appropriate for the court below when setting aside the decision of the Tribunal, to substitute its own decision, rather than remitting the matter to the Tribunal – whether the court below was entitled to make a costs order against a presiding officer (the First Appellant) performing an adjudicative function in the event of the review against his findings being successful.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Goodey AJ sitting as court of first instance).

1. The appeal of the first appellant is upheld with costs including the costs of two counsel.
2. The appeal of the second appellant is dismissed with costs including costs of two counsel.
3. The order of the court a quo is amended to read:

(1) The decision taken on 5 May 2010 by the First Respondent, dismissing the Applicant's appeal against the refusal by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River is reviewed and set aside. The said decision is substituted with the following:

'1. The appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled', is upheld.

2. The said licence is granted to Goede Wellington (Pty) Ltd.'

3. The Second Respondent is to pay the Goede Wellington's costs, including the costs of two counsel.'

JUDGMENT

ERASMUS AJA (HEHER, BOSIELO, TSHIQI and THERON JJA concurring)

Introduction

[1] This appeal, against the whole of the judgment and order of the North Gauteng High Court, Pretoria (high court), concerns a decision taken by Mr Makhanya (the first appellant), an additional member of the Water Tribunal (Tribunal) established in terms of s 146 of the National Water Act[1] (the Act). The Tribunal dismissed an appeal against the refusal, by what was then the Department of Water Affairs and Forestry (the Department), of an application for a licence to use water for farming purposes from the Berg River in the Wellington area of the Western Cape. The high court reviewed and set aside the Tribunal's dismissal of the appeal, substituted the Tribunal's decision by upholding the appeal, granted the water licence and ordered the Minister of Water and Environmental Affairs (second appellant) and the first appellant to pay costs.

[2] The first appellant heard the appeal in his capacity as an additional member of the Tribunal. His appeal in this court is confined to the high court's order that he is to pay the costs in his official capacity. The second appellant's appeal is confined to two issues, namely, whether the Tribunal's decision constitutes administrative action reviewable under the Promotion of Administration Justice Act (PAJA)[2] and (assuming it is), whether it was appropriate for the court a quo when setting aside the Tribunal's decision, to substitute its own decision in place thereof, rather than remitting the matter to the Tribunal.

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[1] Act 36 of 1998

[2] Act 3 of 2000.

Background

[3] The National Water Act came into force on 1 October 1998. The preamble reads as follows:

'Recognising that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle;

Recognising that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources;

Acknowledging the National Government's overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters;

Recognising that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users;

Recognising that the protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users; and

Recognising the need for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to a regional or catchment level so as to enable everyone to participate.'

[4] Goede Wellington Boerdery (Pty) Ltd (Goede Wellington), the respondent, is the owner of the farm Goede Hoop (Goede Hoop) in the Wellington area. ECPA Boerdery (Pty) Ltd (ECPA) is the owner of a farm Middelpos which is situated near Goede Hoop, approximately 300 meters apart. The sole shareholder of Goede Wellington, Mr Edward Malan, is also a trustee and a beneficiary of the Middelpos Trust which in turn is the sole shareholder of ECPA.

[5] ECPA is the legal holder of an entitlement to use water from the Berg River in respect of Middelpos. A small portion of the water use entitlement held by ECPA in respect of Middelpos became available for transfer[3] as a

[3] Section 25 of the Act reads as follows:

'(1) A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such

result of an investment made in updated irrigation technology which resulted in the saving of water. In particular, ECPA shifted from the use of sprinkler and flood irrigation to drip irrigation.

[6] Goede Wellington in turn owns an entitlement to use water from the Berg River in respect of Goede Hoop. It however needed further water to facilitate the development of a high quality citrus orchard. During July 2005 it thus entered into an agreement with ECPA according to which the latter would surrender some of its water use entitlement to Goede Wellington for use on Goede Hoop. Goede Wellington's use was made conditional upon it obtaining the necessary licence from the Department.

[7] In November 2005 Goede Wellington applied to the Department for a water licence in terms of the Act[4] for the use of water in respect of seven hectares of irrigable land. It indicated that it intended to use the land for high quality citrus production. This would promote the efficient use of good agricultural land in the area; ensure better opportunities for sustainable permanent employment; contribute to investment; increase in economic activity and the influx of export revenue for the local economy. The application was supported by, amongst others, the Berg River Irrigation Board[5] and the Department of Agriculture in the Western Cape Provincial Government.

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conditions as the water management institution may determine, to use some or all of that water for a different purpose, or allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose.

(2) A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement –

(a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and

(b) on condition that the surrender only becomes effective if and when such application is granted.

. . .'

[4]See ss 40 and 41 of the Act.

[5]Being responsible for the management of water in respect of the applicable catchment area.

[8] In March 2006 the Regional Director: Western Cape of the Department (Regional Director) recommended the approval of the licence application. Its recommendation was accompanied by a detailed analysis of the application in relation to s 27(1) of the Act. Section 27(1) provides an open list of factors to be considered by a licensing authority in the adjudication of a licence application. The section provides:

'(1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including–

(a) existing lawful water uses;

(b) the need to redress the results of past racial and gender discrimination;

(c) efficient and beneficial use of the water in the public interest;

(d) the socio-economic impact–

(i) of the water use or uses if authorised; or

(ii) of the failure to authorise the water use or uses;

(e) any catchment management strategy applicable to the relevant water resource;

(f) the likely effect of the water use to be authorised on the water resource and on other water users;

(g) the class and the resource quality objectives of the water resource;

(h) investments already made and to be made by the water user in respect of the water use in question;

(i) the strategic importance of the water use to be authorised;

(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and

(k) the probable duration of any undertaking for which a water use is to be authorised.'

(My underlining.)

[9] The Regional Director found in favour of Goede Wellington on each of the factors analysed and concluded that the existing legal uses of the water would not be affected by the transfer, that after the transfer the water will be put to more efficient use (this was also recognised by the Department of Agriculture) and that export revenue will be generated. Most importantly for present purposes, in relation to the factor relating to redressing the results of

past racial and gender discrimination, the recommendation found, firstly, that the transfer would create new job opportunities in what, it can be remarked, is an unemployment stricken labour market and that '[i]f the transfer of the water use is not authorised, job opportunities will be lost'. Secondly, the report remarked that Goede Wellington employed both male and female workers.

[10] In May 2007 the Chief Director: Water Use in the Department (the Chief Director) wrote to Goede Wellington. The Chief Director indicated, notwithstanding the Regional Director's recommendation, that the 'application neither contributes to redress of the results of the past racial discrimination nor promotes the equitable access to water' and that Goede Wellington should show cause why the application should not be denied on that basis. In response, Goede Wellington submitted a 'social and labour management report' compiled by human resource consultants as well as an 'economic report'. In these reports, along the lines of the Regional Director's findings, it was again submitted that Goede Wellington is committed to affirmative action, that it has a skills development plan in place and that it is committed to employment equity. It also stated that it aids its employees by 'increasing employee(s)(sic) access to educational institutions and by the inclusion of less advantaged groups in the company management structure and (furthermore) (sic) to empower women in its current service'.

[11] In July 2008 the Chief Director, however, informed Goede Wellington that the licence application had been denied as issuance of the licence 'will not contribute towards the need to redress the result of the past and racial gender discrimination'.

Proceedings before the Tribunal

[12] During August 2008 Goede Wellington appealed the decision of the Chief Director to the Tribunal, whose decision was in turn the subject of the

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Section 148(1)*(f)* of the Act provides for an appeal against a decision of a responsible authority on a water licencing application.

appeal to the court a quo. Item 6(1) of Schedule 6 of the Act provides that an appeal to the Tribunal must be heard by one or more members, as the chairperson may determine, and item 6(3) adds that an appeal takes the form of a rehearing and that the Tribunal may receive evidence. In advance of the hearing, Goede Wellington provided the Tribunal with an affidavit which included an account of the factual background to the licence application and provided the relevant information in respect of all eleven factors listed in s 27(1) of the Act. In addition, the legal representative of Goede Wellington submitted detailed heads of argument to the Tribunal.

[13] On 5 May 2010, the Tribunal found against Goede Wellington. It ruled that:

'The Social and Labour Management Report presented by the applicant is silent on both the issues of land ownership and involvement at management level or participation in the running of agricultural enterprise by people from previously disadvantaged communities. When all was said and done . . . there existed no evidence before the Tribunal to the effect that the relevant factors set out in section 27(1) of [the Act] were not considered and no evidence was rendered proving that the application is in consonance with the objectives of section 27(1)*(b)* of the [Act].'

Proceedings before the high court

[14] Consequently Goede Wellington approached the high court. It sought an order inter alia in terms of ss 6 and 8 of PAJA reviewing the decision of the Tribunal, setting it aside, substituting it with an order granting the licence to Goede Wellington and mulcting Mr Makhanya in costs in his official capacity. In the alternative, Goede Wellington asked for an order, inter alia, that its application be deemed to be an appeal in terms of s 149 of the Act. The ground of appeal was that the Tribunal erred and misdirected itself and did not

Section 149 of the Act reads as follows:

'(1)A party to a matter in which the Water Tribunal –

(a) has given a decision on appeal under section 148, may, on a question of law, appeal to a High Court against that decision; or

. . .

comply with s 27(1) of the Act, read with Item 6(3) of Schedule 6[6] thereto, by determining the appeal with reference solely to one of the factors in s 27(1)*(b)* of the Act and evidence in relation to that factor, alternatively with inadequate regard to the other factors in s 27(1) of the Act and the evidence in relation to those factors.

[15] The second appellant opposed the application for judicial review in principle, arguing that because decisions of the Tribunal are subject to appeals to the high court on questions of law under s 149(1)*(a)* of the Act the legislature did not intend to create a review or appeal procedure which is based on procedural irregularities or factual disputes.

[16] The second appellant also opposed the application (whether for judicial review or an appeal under s 149) on its merits, saying, amongst other things, that the Department made a balancing act of the factors listed in section 27(1) and after that balance the application was refused on the basis that it did not satisfy section 27(1)(b), being one of the factors that must be taken into account. The second appellant added that the factor listed in s 27(1)*(b)* embodies all of the socio-economic factors defining the purpose of the Act as set out in s 2, and is the only viable way to achieve the purpose to ensure that the allocation of our water resources redress the result of past racial and gender discrimination.

[17] The high court, referring to the constitutionally enshrined right to lawful, reasonable and procedurally fair administrative action, found that the mere

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(2) The appeal must be noted in writing within 21 days of the date of the decision of the Tribunal.

. . .

The appeal must be prosecuted as if it were an appeal from a Magistrate's Court to a High Court.'

[6]Item 6(3) of schedule 6 of the Act reads as follows:

'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.'

fact that the Act is silent on a right to review an application for a licence does not mean that that right is excluded. It emphasised the fact that courts must treat the decisions of the executive with appropriate respect, but also that courts may not rubberstamp unreasonable decisions simply because of the complexity of the decision or the identity of the decision-maker and that their deference to the executive must not be shaped by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for and the consequences of judicial intervention. It found that the Act allows for review in appropriate circumstances and that the Goede Wellington's case was such an instance. As a result of the court a quo's decision to uphold the application for judicial review, it did not consider Goede Wellington's alternative appeal under s 149 of the Act.

[18] The court came to the conclusion that Mr Makhanya misinterpreted s 27(1) of the Act. In doing so, he committed a material error of law. It found that it was clear that the Tribunal adjudicated the appeal as if the factor provided for in s 27(1)*(b)* was a prerequisite for the granting of a water licence, and that it did not consider all relevant factors as required by s 27(1). This was also evidence of the fact that the Tribunal had not applied its mind properly. The decision therefore fell to be set aside.

[19] The court further found that the required exceptional circumstances existed for substituting its decision for that of the Tribunal. It found that it was at least as well qualified as the Tribunal to decide the matter, that sending it back to be heard by the Tribunal would be a waste of time and that further delay would cause unjustifiable prejudice to Goede Wellington. Further, it found that the decision of both the Chief Director and the Tribunal displayed an alarming degree of ineptitude, a lack of appreciation of what was required of them, a lack of judgment, rationality, common sense and serious incompetence.

[20] For those reasons and, in addition, for the Tribunal's lack of expertise, legal prowess, failure to apply its mind and the failure to have a legal expert

on board the court made a cost order against the second appellant and Mr Makhanya (first appellant) in his official capacity as a member of the Tribunal, the one paying the other to be absolved.

The appeal in this court

[21] The second appellant, whilst accepting that the Chief Director's decision not to grant the water licence to Goede Wellington was an administrative action reviewable under PAJA, argues that the decision of the Tribunal did not constitute administrative action reviewable under PAJA. Further, and if it should be found that PAJA does apply, the second appellant argues, no exceptional circumstances were present which would allow the high court to substitute its decision for that of the Tribunal. Accordingly that court should have remitted the matter to the Tribunal.

[22] The second appellant now also concedes that an error of law was made, which both underlies the main ground of review upheld by the court a quo and constitutes Goede Wellington's ground of appeal that the Tribunal considered only one of the factors (being that under s 27(1)*(b)*) as essential and decisive, rather than considering all of the factors prescribed in the statute (and any other considerations that might be relevant) in reaching its decision.

[23] The second appellant points to various indicators in the Act which, according to him, shows that the decision of the Tribunal in Goede Wellington's case, was not 'truly of an administrative nature': the Tribunal sits as an appellate body, exercising what are in effect judicial functions akin to that of a court. In this regard, the second appellant submits that it is significant that the Act does not make an express reference to any right of review, instead the legislator provided for an appeal directed to the high court only on an issue of law.

[24] Mr Makhanya only opposes the costs order made against him in his official capacity.

[25] Goede Wellington essentially supports the judgment of the high court. It submits that the decision to dismiss the appeal against the Chief Director's refusal of the licence application is administrative action as defined in PAJA and that the court a quo correctly substituted its decision for that of the Tribunal. The question of exceptional circumstances has substantially changed: new evidence was admitted in this appeal that the Tribunal has been dissolved. What is more, it says, there is no justification for this court to interfere with the court a quo's discretionary decision to award costs against Mr Makanya in his official capacity.

[26] I now turn to the consideration of whether the decision of the Tribunal was reviewable under PAJA and could be substituted by the court a quo.

[27] The Tribunal effectively had to rehear the application for the water licence. It is well recognised that an application of that nature will ordinarily qualify as administrative action, since the advent of the Constitution.[7] Administrative appeals usually allow for the reconsideration of an administrative decision by a higher authority.[8] Indeed, Hoexter, writing in general, says that the 'person or body to whom the appeal is made steps into the shoes of the original decision-maker, as it were, and decides the matter anew.'[9] However, each Tribunal falls to be considered relative to its empowering legislation.

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[7] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 184. Also see *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 (4) SA 375 (T) at 382E-G; *Commissioner, South African Police Service v Maimela* 2003 (5) SA 480 (T) at 485D; and in relation to PAJA *Magingxa v National Commissioner, South African Police Service* 2003 (4) SA 101 (TkH) at 109J-110A.

[8] Hoexter *Administrative Law* at 65.

[9] Id.

Chapter 15 of the Act

[28] This court in *South African Technical Officials' Association v President of the Industrial Court & Others* 1985 (1) SA 597(A) at 610G-I held that a body that is empowered to perform some of the functions of a court of law is not necessarily to be regarded as a court of law.[10] An administrative body can perform the duties and functions of a court of law without becoming one. The status and true identity of a particular body is not determined solely by the nature and the type of the functions it performs. Certain factors are indicative of whether a tribunal should indeed be seen as a court of law. This approach was approved in *Sidumo,* where Navsa AJ (with whom the majority of the Constitutional Court concurred on this issue) held that while there are similarities between arbitrations before the Commission for Conciliation, Mediation and Arbitration ("CCMA") established by the Labour Relations Act 66 of 1995 and proceedings before a court of law, the CCMA is not a court of law because there are also significant differences, including that: a commissioner is empowered to conduct the arbitration with the minimum of legal formalities, there is no blanket right to legal representation, the CCMA does not follow a system of binding precedents, and commissioners do not have the same security of tenure as judicial officers or undergo judicial training.

[29] In the instant matter the members of the Tribunal do not have the same security of tenure as judicial officers. Item 1 of Schedule 6 to the Act provides that a member is appointed for a period determined by the second appellant. In terms of item 4, read with s 146(8) of the Act, the appointment of a member may be terminated 'for good reason' by the second appellant and after 'consultation with the Judicial Service Commission'. The uncertain tenure of the office those selected to comprise the Tribunal, is not compatible with judicial independence.[11]

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[10]Also see *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 82.

[11] See *Sidumo* at 612D.

[30] As to the training of the members of the Tribunal, some have no legal training or expertise. They may be appointed on the recommendation of the Water Research Commission established by s 2 of the Water Research Act[12] because they are qualified in water resource management or engineering in related fields. It is thus perfectly possible and in accordance with the Act that an appeal to the Tribunal could to be conducted by a person who has no legal experience or training and merely has a degree in engineering. These factors go to show that the court is dealing with an administrative tribunal which performed an administrative action, as defined in s 1 of PAJA, in dismissing Goede Wellington's appeal.

[31] In *President of the RSA v South African Rugby Football Union*[13] with reference to the right to administrative justice in terms of s 33 of the Constitution it was stated:

'In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks.[14] The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'

The nature of the power exercised by the Tribunal was no less and no more than a consideration of whether a water licence should be granted or not. Consequently the court a quo was correct in finding that the decision of the Tribunal constituted administrative action.

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[12] 34 of 1971.

[13] 2000 (1) SA 1 (CC) para 141.

[14] There may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers. That, however, is not an issue we need consider here.

[32] The second appellant conceded that the Tribunal made an error of law in only considering one of the factors as essential and decisive, rather than considering all the relevant factors prescribed in the statute.

[33] To my mind, however, and according to Goede Wellington, the reasonableness of the decision must also be called into question. The Constitutional Court has previously had occasion to address administrative decision-making where the official is faced with a number of considerations of which racial redress is one. Much like the situation facing the court in *Bato Star*,[15] s 27*(b)* contains a wide number of objectives and principles. Some of them may be in conflict with one another, as they cannot all be fully achieved simultaneously. There may also be many different ways in which each of the objectives stand to be achieved. The section does not give clear guidance on how the balance an official must strike is to be achieved in doing the counterweighing exercise that is required.[16] As opposed to the legislative scheme before the court in *Bato Star*, there is no indication in the Act that s 27(1)*(b)* is to be regarded as in any way more important than the other factors.

[34] As to the s 27(1)*(b)* requirement itself, our courts recognise that, at least where there is no express legislative provision to the contrary, transformation such as that envisioned in the section can be achieved in a myriad of ways. Indeed, there is no one simple formula to achieve transformation.

[35] Section 6(2)*(h)* of PAJA requires a simple test: an administrative decision will be reviewable if it is one a reasonable decision-maker could not reach.[17] In the instant case, where the administrator was faced with a balance

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[15]*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).

[16]*Bato Star* (CC) para 32.

Bato Star (CC) para 35.

[17]*Bato Star* (CC) para 25.

to be struck, it is constitutionally endorsed and opportune to ask: did the administrator strike a balance fairly and reasonably open to him?[18]

[36] . It is not for the courts to consider whether the Tribunal's decision was the best decision in the circumstances, and overstep the limits imposed on this court by our constitutionally enshrined separation of powers doctrine.[19] The court in fulfilling its judicial function is to enquire whether the Tribunal's decision struck a reasonable balance between all the factors set out in s 27*(b)*, and some not mentioned in the section, owing to its inclusive nature.[20]

[37] It must be observed that the need to redress the results of past racial and gender discrimination is only one factor in a non-exhaustive list of several factors that have to be taken into account when issuing a licence. It clearly does not presuppose a crude approach where a s 27(1)*(b)* sledgehammer should be taken to an otherwise exemplary application. In this case, it cannot even be said with any degree of certainty that Goede Wellington did not satisfy the s 27(1)*(b)* requirement standing on its own. The Regional Director Western Cape concluded that Goede Wellington's application did indeed satisfy the requirement.

[38] The preamble to the Act makes it clear that water is a natural resource that belongs to all people and that the discriminatory laws of the past have prevented equal access to water and the use of water resources. It makes it equally clear that water in South Arica is scarce. The preamble recognises that the ultimate aim of water resource management is to achieve the

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[18]*Bato Star* (CC) para 44 where *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) was quoted and said to provide "sound guidance" in determining what constituted reasonable action of an administrative decision-maker under PAJA.

[19]*Bato Star* (CC) para 54.

[20] As Schutz JA said in *Minister of Home Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd & Another*; *Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 50 'judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function'. O'Regan J agreed with this statement. (*Bato Star* (CC) 46.)

sustainable use of water for the benefit of all users. It states that the 'protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users'.

[39] The Act provides many factors, one of which is the redress factor. It must be seen against the background of the constitutional commitment to achieving equality and remedying the consequences of past discrimination.[21] Section 9 of the Constitution provides that '[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' But transformation can be achieved in various ways.[22] How it is to be achieved in accordance with a particular Act is an issue of, among other things, legislative interpretation.[23] The process to be followed in the instant case is not delineated by a points scoring system or the like to assist the Tribunal in assessing a particular application. The assessment is largely left to the official's ability to assess a particular application in relation to the factors stipulated in s 27*(b)*.

[40] The Act provides an open and transparent means by which applications must be assessed. Although much is left to the discretion of the decision maker who is allowed to take factors into consideration not mentioned in the list, it is clear that s 27*(b)* and indeed the rest of the Act, requires these factors to be assessed by finding an appropriate balance after evaluating all the factors expressly provided for and others. Neither the Act nor the section attributes any significant weight to any of the factors. And, to my mind, a decision maker, who would not be able to add factors to a closed legislative list of factors, cannot on a whim decide to elevate one factor to pre-eminence. That this was done is clear from the reasons provided by the

[21]Ngcobo J in *Bato Star* (CC) para 75.

[22]Ngcobo J in *Bato Star* (CC) para 104.

[23]Ngcobo J in *Bato Star* (CC) para 77 et seq.

Tribunal. The court a quo was therefore correct in concluding that the decision not to grant the licence sought by Goede Wellington had been unlawful.

[41] I now turn to the substitution order made. PAJA provides that in judicial review proceedings a court may grant any order that is just and equitable.[24] It expressly provides for orders which are included within the just and equitable rubric. An order setting aside an administrative action can be coupled with other remedies such as remitting the matter for reconsideration, varying an administrative action and correcting a defect. PAJA further provides that it would be just and equitable for a court to substitute an administrative action with one of its own making in 'exceptional circumstances'.[25] It is this remedy that the court a quo thought competent. The high court quashed the administrator's decision and substituted its decision for that of the Tribunal, awarding the licence sought to Goede Wellington.

[42] PAJA does not provide guidelines as to what may be understood under the term 'exceptional circumstances'. However, the recognition of the principle that a court should be slow to assume a discretion which has been statutorily entrusted to another tribunal, which finds expression in the statutory requirement,[26] predates the Act's enactment in our law. In *Johannesburg City Council v Administrator, Transvaal*[27] Hiemstra J after recognising the principle, held that where the end result is in any event a foregone conclusion and it would merely be a waste of time to refer the matter back to the administrative functionary, the court will depart from the ordinary course. Most relevant to the instant case is that it was held that a court would be particularly willing to substitute its decision for that of the administrative functionary where 'much time has already been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by the

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[24]Section 8(1).

[25]Section 8(1)*(c)*(ii)*(aa)*.

[26]Hoexter *Administrative Law* at 552.

[27]*Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T).

reference back is significant in the context.'[28] It was held that the object of this consideration is to minimise future loss of time.[29] *Johannesburg City Council*, written in 1969, has however been held not to fully describe the position under the Constitution and PAJA.

[43] A case is exceptional when, on a proper consideration of the relevant facts, a court is persuaded that a decision to exercise the power in question should not be left to the designated functionary. That determination will be made with reference to established principles, like those in *Johannesburg City Council*, informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[30] As the Constitution enshrines everyone's rights to lawful, reasonable and procedurally fair administrative action,[31] a court has to have regard to considerations of fairness.[32] There will be no remittal to an administrative authority in cases where such a step will operate procedurally unfairly.[33]

[44] A further important consideration is whether the court a quo was in a position to make the decision and whether, in addition, fairness dictated that it should have done so. It must be emphasised that an administrative decision making body is generally best equipped by its composition, experience, and access to sources and expertise to make the right decision.[34] It is now

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[28]At 76E-G.

[29]At 77D.

[30]*Gauteng Gambling Board v Silverstar Development Ltd* & others 2005 (4) SA 67 (SCA) para 28.

[31]Section 33(1) of the Constitution provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[32]*Commissioner, Competition Commission v General Council of the Bar of South Africa & others* 2002 (6) SA 606 (SCA) para 14.

[33]Id.

[34]*Gauteng Gambling Board v Silverstar Development Ltd & others* 2005 (4) SA 67 (SCA). Also see *Minister of Enviromental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Enviromental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) paras 47 -50.

established that the mere fact that a court considers itself as qualified to take the decision in place of the administrator is not sufficient for it to do so. Fairness to the applicant must also be considered and could tilt the scale in favour of an applicant. Considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.[35]

[45] The only reasonable decision that could have been reached by the Tribunal, had it assessed the appeal in accordance with the Act, is that Goede Wellington's application for a licence should be granted. What is more, further delay will cause unjustifiable prejudice to Goede Wellington. The trees in the citrus orchard were already planted between six and eight years ago and they require the additional water as soon as possible in order to develop and produce to their full potential.

[46] Furthermore, from what has come to the attention of the court, both from the Bar and from communications between the parties which form part of the record, the consideration of a referral back to the Tribunal for a speedy result would be to rely on wishful thinking. The Tribunal has been disbanded. Counsel for the second appellant informed the court that there are amendments to the Act in the offing. However, neither counsel could indicate whether and when the Tribunal would be functional again. The Goede Wellington could face an indefinite delay in consequence of remittal.

[47] Astoundingly, after acknowledging the foregoing in a communication addressed to Goede Wellington, the State Attorney informed it that should this court rule in the second appellant's favour the matter will be referred to a mediation panel in accordance with s 150 of the Act. I say astounding, as the mediation panel provided for in s 150 is aimed at the settling disputes through a process of mediation and negotiation. It is not a body appropriate to consider the application for awarding of licenses.

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[35] *Commissioner, Competition Commission* para 15.

[48] In the event, exceptional circumstances exist which show that the court a quo's substitution order was well made. What is more, considerations of fairness overwhelmingly dictate that this matter be speedily resolved by this court.

Costs

[49] The high court awarded costs against Mr Makanya in his official capacity. As it will be recalled, Mr Makanya did not oppose the relief sought either in the high court or this court, he merely challenged the order of costs made against him.

[50] It is trite that in awarding costs a court of first instance exercises a judicial discretion. A court of appeal cannot interfere in the exercise of that discretion merely because it would have made a different order.[36] The power of this court, a court of appeal, to interfere is limited to those cases where the exercise of the judicial discretion is vitiated by misdirection, irregularity, or the absence of grounds on which the court below, acting reasonably, could have made the order in question.[37]

[51] The general principles relating to awards of costs against public officers were stated by Innes CJ in *Coetzeestroom Estate and GM Co v Registrar of Deeds.*[38] The central tenet of these principles is that mulcting an official in costs where his action or attitude, though mistaken, was bona fide would be inequitable. It was also established that it would be detrimental to the proper functioning of the administration which is essential in the public interest to maintain. This is as the official would be hampered in making the decisions he is mandated to make in fear of a costs order being made against him in subsequent litigation. It was also laid down that this would be so

[36] *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 976H; *Minister of Prisons and another v Jongilanga* 1985 (3) SA 117 (A) at 124B.

[37] See *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D – E.

[38] 1902 TS 216 223-224.

whether he is indemnified from paying from his own pocket or not. What is more, where a public official does not oppose the relief sought or opposes with the motive merely to assist the court, no cost order will in the normal course be made against him.[39] However, the court, in keeping with its discretion to make a costs order it deems fit, retains the right to make a costs order where an official's actions are mala fide or grossly irregular.[40] Proof of mala fides or grossly unreasonable conduct is necessary.[41]

[52] In the instant case no mala fides or grossly unreasonable conduct was proved and the high court erred in mulcting Mr Makhanya in costs. As has been shown, he at most struck a balance not open to him in law.

Order

[53] 1. The appeal of the first appellant is upheld with costs including the costs of two counsel.
2. The appeal of the second respondent is dismissed with costs including costs of two counsel.
3. . The order of the court a quo is amended to read:
(1) The decision taken on 5 May 2010 by the First Respondent, dismissing the Applicant's appeal against the refusal by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River is reviewed and set aside.
The said decision is substituted with the following:

> '1. The appeal by Goede Wellington Boerdery (Pty) Ltd against the refusal on 11 April 2008 by the Chief Director: Water Use in the Department of Water Affairs and Forestry of the Applicant's application for a licence to use water from the Berg River to which ECPA Boerdery (Pty) Ltd is currently entitled, is upheld.

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[39] *Fourie v Cilliers* 1978 4 SA 163 (O) at 166 B - D.

[40] See *Flemming v Flemming* 1989 (2) SA 253 (A) at 262B-263A;

[41] Per Eloff AJP writing for the full bench in *Hammond-Tooke v Stadsklerk van Pretoria* 1989 (3) SA 977 (T) at 990E – G.

2. The said licence is granted to Goede Wellington (Pty) Ltd.’

3. The Second Respondent is to pay the Goede Wellington’s costs, including the costs of two counsel.’

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N ERASMUS

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR FIRST APPELLANT:	M Mojapelo
	Instructed by:
	L Mbanjwa Incorporated, Pretoria
	Naudes Attorney, Bloemfontein
FOR SECOND APPELLANT:	P Kennedy SC (with him T Makhubele)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
FOR RESPONDENT:	AM Breitenbach SC (with him EF van Huyssteen)
	Instructed by:
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