

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

26810/2022

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| (1) | <u>REPORTABLE:</u> |
| (2) | <u>OF INTEREST TO OTHER</u> |
| | <u>JUDGES:</u> |
| (3) | <u>REVISED.</u> |

In the matter between:

ROWING SOUTH AFRICA

First Applicant

WORLD ROWING MASTERS REGATTA

Second Applicant

And

BARBARA GREECY N.O.
Respondent

First

SENZO MCHUNU N.O.

Second Respondent

JUDGMENT

MAKUME, J:

- [1] This matter is divided into two parts. In part “A” the Applicants seek an order that the Respondents be directed to consider the application lodged by the Applicants in terms

of Section 21(1) of the National Water Act 36 of 1998 within 3 days from date of such order.

- [2] This Section enables the Applicant to deal with certain Hyacinth that grows on the Roodeplaat Dam. The Applicants seek permissions and to be provided with Herbicide for treating the indigenous species.
- [3] They say the application is urgent because during the first week of November they are to host Provincial Regatta Competition at the dam and that next September 2023 they will be hosting World Championships at the same venue.
- [4] This application was issued on the 29th September 2022 and served on the second Respondent on Friday the 30th September 2022 at 12h25 on the personal secretary of Minister Senzo Mchunu. There has been no service on first Respondent Minister Barbara Greecy.
- [5] On the 4th October 2022 the parties appeared before me duly represented by counsel. The matter stood down to the 7th October 2022 to afford the Respondents an opportunity to file their Answering Affidavit which they did. The Applicant subsequently also filed their Replying Affidavit.
- [6] It is common cause that the Respondents have in their Answering Affidavit besides dealing with the merits of the application raised the issues that firstly the application is not urgent and falls to be struck-off the roll with costs. Secondly that proper procedure was not followed and thirdly that the application is premature in that in terms of the Department's Standard Operation Procedure the Respondent had 90 days to consider the application which period will only expire during December 2022.
- [7] There are two issues for determination by this Court. Firstly, it is whether the application is urgent, secondly whether the Applicants have made out a case justifying an order as prayed for in Part "A"

URGENCY

- [8] The Applicants basis for bringing this application on an urgent basis is set out from paragraph 69 up to and including paragraph 71. In brief it is that the Respondent's failure or inaction to deal expeditiously with their application for a Water Use License in terms of Section 21(1) of the National Water Act is prejudicing them in that firstly the Water Hyacinth is growing rapidly and poses a threat to the use of the dam for events scheduled to take place during November 2022.
- [9] Secondly the Applicant says that for a considerable time it has been employing labourers to remove the hyacinth manually and sourced private funding for herbicides for the spraying of the water hyacinth. Applicant contend that it can no longer continue to do that for an indefinite period.
- [10] The Applicants contend further that the manual removal of the water hyacinth by labourers has caused the Applicant to incur costs whilst obtaining no benefit from such expenditure. It is further contended by the Applicants that failure to deal effectively with the water hyacinth will result in sporting activities scheduled for the dam to be cancelled causing them reputational damage. Lastly it is argued that the Applicants will not receive sufficient redress in the ordinary course should this matter not be heard as an urgent application.
- [11] In response to the urgency aspect the Respondent sets out in paragraph 7 and 8 of its Answering Affidavit Standard Operating Procedure (SOP) for dealing with preliminary application for authorisation and water use license. The Respondent say that the purpose of the SOP is to standardise the water use license application assessment processes with the Department of Water Services (DWS). That document provides the necessary tools that must be used by an official during the process of assessing a water use license application.
- [12] According to the Respondent the procedure leading to the granting or rejection of a water use license is as follows:
- 12.1 Such application for water use license are managed through a product called the E Wulaas.

- 12.2 The pre-application should be submitted to the North West Region as per the DWS regional demarcation.
- 12.3 On receipt of such application the Wula Manager in Northwest will then assign the application to an assessor or case officer.
- 12.4 The assessor or case manager will then undertake the necessary pre-application meeting to determine the type of application and information required.
- 12.5 The Department of Water Service (DWS) will then screen the application to determine if all the information has been submitted and if so a letter acknowledging the application as complete will be sent to the Applicant and if the application does not meet the requirement it is rejected.
- 12.6 The accepted application undergoes assessment and a decision is made within 90 days as per the Standard Operating Procedure.

[13] The Respondent says that the Applicants did not submit the water use license application to the DWS and that DWS only received a request for a pre-application engagement from the Department of Fisheries, Forestry and Environment (DFFE) on the 22nd September 2022 through Ms Debbie Muir. Even then the Respondent says that the pre-application request was submitted to the Gauteng Region instead of Northwest as per the DWS regional demarcation.

[14] It is clear that the Respondents are bound by legislation and its own Standard Operation Procedures and cannot be expected to flout its own rules by issuing a Water use license without following the procedure. The argument that because of the forthcoming events to be hosted at Roodeplaat the Applicants want this application to be dealt with urgently is untenable. Firstly, the events are set for March 2023 and September 2023 there is no urgency because the application is being dealt with now and the Respondent still has time as per the SOP to finalise its assessment.

[15] In my view this application was not urgent and should have been struck-off the roll. I allowed the parties to address the merits as more often than not the issue of merits keeps on cropping up whenever urgency is taken as a point in *limine*.

MERITS

[16] It is worth it to re-state what the Respondents say in paragraph 12-37 of their Answering Affidavit:

“A thorough evaluation of the application by the Department is critical to protect the water resources, ecology, and humans as set out in Section 2 and 18 of the National Water Act, Act no 36 of 1998. The activity involves spraying of chemicals to control weeds which constitute a water use in terms of Section 21(1) of the Act, hence a water use license or authorisation in terms of Section 22 of the Act is required.”

[17] It is against this background that I now have to determination if the Applicants have made out a case for the relief they seek in Part “A”

[18] There is a dispute as to whether the application submitted to the Respondent was done so in terms of Regulation 6 as contended by the Applicants or whether it was submitted in accordance with the provisions of E Wulaas which mean that when the application was received whether it was on the 6th September 2022 or the 22nd September 2022 same was still in the pre-application stage awaiting assessment in accordance with the Standard Operating Procedures.

[19] There is merits in the Respondents contention that the application was still in its pre-application stage this is evidenced by an email send to one Kobus by Debbie Muir in which she said the following:

“Please advise on how this will be sprayed as I need to do the risk assessment matrix first.”

This email was in response to a request by the Applicant to be supplied with 20 bags of some form of an herbicide called Kilo-max.

[20] It is significant to note that all the correspondence that the Applicant makes reference to in its Replying Affidavit which in fact introduce new matter is all correspondence exchanged prior to the lodging of the water use license in terms of Section 21(1) of the Act.

[21] It is also incorrect to argue that the Respondents have shown no interest in attending to the issue at hand I say this because in her letter dated the 7th September 2022 Debbie Muir said the following:

“Thank you for this information I will do the risk assessment with this information and submit to Peter (Venter) by latest Friday 9 September 2022 to request the GA but the quantities of herbicides to be used I will calculate based on the biomass and please ensure that the spraying does not exceed these amounts as this will then be outside the GA approval.”

[22] The contents of that email can only mean that the Applicants were permitted in terms of a General Authorisation (GA) to proceed and spray the chemicals and deal with the hyacinth whilst the application for a water use license in terms of Section 21 (1) was pending.

[23] The Applicants have referred this Court to Annexure RA3 attached to its Replying Affidavit. It is a copy of the Regulations published in Government Gazette Number 40713 dated the 24th March 2017 of importance is that the regulations are divided into various paragraphs. Of application to the matter is the portion titled “Application for Water Use License” clause 3 (6) reads as follows:

“The process of water use license application, consideration and decision shall be undertaken within a period of 300 days of submitting such application.”

[24] Then there is a subheading which is titled “Pre application enquiry meeting” clause 5(3) thereof reads as follows:

“The Applicant can submit his or her application at any time after the pre-application enquiry meeting.”

- [26] It is quite evident that the Applicants have not as yet submitted a water use application they are still engaged with the Department with the pre-application proceedings. The Applicants has accordingly not demonstrated a clear or *prima facie* right to be considered as Applicants for a water use license as contemplated in Section 21(1).
- [27] The Respondents in its Answering Affidavit at 10.5 and 12-39 have reiterated that if the Applicant was desirous of fast tracking its application there was no need to come to Court with such haste all that the Applicant should have done was to request the DFFE to plan and submit the application in line with the applicable timeframes. This process is known to the Applicants. In paragraph 12-39 the Respondents also allude to the fact that if there is a need to fast track the application the Applicant can always requests the DWS to do so through the relevant water use licencing officials or the Regional Head Northwest. They say that the matter could also have been escalated to Head Office as both offices of DWS and DFFE have a cordial and open line of communication on urgent matters. The Applicant in its Replying Affidavit has not disputed these facts.
- [28] I have accordingly come to the conclusion that the Applicant has failed to prove that it has no alternative relief. In my view the balance of convenience does not favour the granting of the interlocutory interdict as prayed for in Part “A”.
- [29] The Court in **Gool vs Minister of Justice and Another 1955 (2) SA 682 C at page 687** concluded that where the Applicant cannot show a clear right and more particularly where there are disputes of fact the Court approach in determining whether the Applicants ‘rights is *prima facie* established though open to some doubt, is to take the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether having regard to the inherent probabilities the Applicant should on those facts obtain final relief at the trial of the main action.

[30] The principal relief claimed in Part “B “of the notice of Motion is that the Respondent be declared to have failed to uphold their obligation arising from the National Water Act 86 of 1988 and secondly that they be compelled to give effect to the provisions of the Act and other ancillary statutory requirements.

[31] The question which remains to be answered is whether a *prima facie* case on the facts has been established in regard thereto. The reasons which led the Applicant to approach this Court on an urgent basis are largely disputed and not capable of being resolved by notice of motion. The Respondent relies on the SOP and that it has never turned down the application as it has not as yet been received.

[32] In the result I make the following order:

ORDER

- (i) The application is dismissed.
- (ii) The Applicants are ordered to pay the costs of this application on a party and party scale including the costs of counsel.

Dated at Johannesburg on this day of November 2022

JOHANNESBURG

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,

Appearances:

DATE OF HEARING : 07 OCTOBER 2022
DATE OF JUDGMENT : NOVEMBER 2022
FOR APPLICANT : ADV PETER

INSTRUCTED BY : VERMAAK MARSHALL WELLBELOVED INC
FOR RESPONDENT : ADV MOTIMELE
INSTRUCTED BY : THE STATE ATTORNEY