

SOUTH AFRICA / JUDGMENT

EC Irka CC v Department of Water and Sanitation (WT01/20/EC)

[2023] ZAWT 3 (15 November 2023)

[2023] ZAWT 3

COURT

Water Tribunal

BEFORE

Ntika Maake

CASE / FILE NUMBER

WT01/20/EC

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IN THE WATER TRIBUNAL

CASE NO: WT 01/20/EC

In the appeal of:

IRKA CC APPELLANT

DEPARTMENT OF WATER AND SANITATION FIRST RESPONDENT

Heard on: 18 October 2022, 30 January 2023, 22 May 2023.

RULING ON THE APPEAL

INTRODUCTION

1. This is an appeal to the Water Tribunal in terms of Section 148(1)(f) of the National Water Act 36 of 1998 (“the National Water Act”) against the decision of the Respondent to a verification of water use dated 31 October 2018 (“the impugned decision”) in respect of farm Rockville No. 427, Joubertina (“Farm 427”) in terms of section 35(4) of the Water Act.
2. The bedrock of Appellant’s case is that it is adversely affected by the impugned decision of the Respondent because it is a downstream user of the water relative to the farm Rockville No. 427, Joubertina.

The legal basis of the Appellant’s are as follows:

- (a) The incorrect water use verification issued by the Respondent in terms of section 35(4) of the Act on the property dated 30 October 2018.

- (b) The water use during the qualified period was substantially less than the verified volume as per the said sec 35 (4) Notice, and thus the verified volume deviates from the existing lawful use as during the qualified period, namely the period from 1 October 1997 to 30 September 1999. The Appellant will make use of Schoeman and Partners in corroboration of its appeal.
- (c) The volumes of water use as it appears on the said sec 35 (4) notice, are reflective of an incorrect duplication of water use.

3.(d) The argument in paragraph (c) above, is emphasised in paragraph 13.2 of the Particulars of Claim in Case no 132/2020 (Eastern Cape Local Division of the High Court in the matter of Mount Africa Trading 1 CC and others v Irka CC and Another), where it is stated as follows in respect of the verification of the water use of the property:” In terms of annexure ‘POC3’ the total allocation of water for irrigation purposes is 129,167,50 cubic meters per annum via the dam from the spring Duikerskloof...” (my underlining).

- (d) The Respondent did not take into account the effect of the servitude conditions contained in Deeds of Transfer no T 36855/2013, T 63801/2007, Notarial Deeds no 456/1973 and 2241979 as required in sect 34 (1) of the Act.
- (e) The verification of the water use on the property, will, if unchanged, result in inequitable access to water by the Appellant, which will be in contravention of the provisions of sec 2 (b) and 3 (2) of the Act.
- (f) The Appellant did not receive notice of the decision of the responsible authority from the Respondent, as required in secs 148 (1) (e), 35 (3) (c), 42 (a), 51 (1) and paragraph 1 of Schedule 2 of the Act.
- (g) The decision of the responsible authority has not been published in the Government Gazette.
- (h) No reasons were given for the decision of the Respondent.
- (i) As a downstream user the Appellant is adversely affected by the decision of the Respondent, which if implemented, would result in the termination of Appellant's farming activities.
- (j) The 30-day period mentioned in sec 148 (3) of the Act could not have commenced should Appellant not have received due notice as set out above;
- (k) Further legal arguments will be given at the appeal hearing.[1]

4. The Respondent also filed its Statement of grounds of Defense for opposing the appeal whereby it stated that the Appellant is not

adversely affected by the impugned decision. It stated amongst others the following[2]:

4.1. The Appellant is not the owner of Farm 427.

4.2. Farm 427 is owned by Mount Africa Trading 1 CC (‘Mount Africa’).

4.3. The Appellant owns Farm 421 in respect of which the Respondent issued A preliminary verification of water use in terms of section 35(1) of the Water Act.

4.4. The Appellant accepted the preliminary verification issued in term of section 35(1) of Farm 421. A copy of the Appellant's response to the section 35 (1) notice is attached hereto, marked Annexure "B".

4.5. It is clear from Annexure "B" that the Appellant accepted the preliminary water use certification in respect of its own farm.

4.6. Consequently, the Respondent issued a water use verification in respect of Farm 421 dated 18 December 2017 in terms of section 35(4) of the Water Act.

4.7. The Appellant did not appeal against the water use verification reflected in Annexure "C".

4.8. In terms of Annexure "C", the Appellant may take 86 939m per annum for irrigation purposes from the spring in the Duikerskloof ("the spring").

4.9. The Appellant takes the water directly from the spring via a pipeline in terms of the water use verification reflected in Annexure "C" and is therefore not a downstream user adversely affected by the impugned decision.

5. Consequently, the Appellant has no locus standi to lodge an appeal against the impugned decision and the appeal ought to be dismissed on this basis alone.

SECOND POINT IN LIMINE- NON-JOINDER OF MOUNT AFRICA TRADING 1 CC[3]

6. Mount Africa is not a party to this appeal and has not been cited as a . Respondent by the Appellant.

7. As owner of Farm 427, Mount Africa has a direct and substantial legal interest . in the appeal.

8. Accordingly, the relief sought on appeal cannot be granted and the appeal must be dismissed on this basis alone.

THE POINT IN LIMINE- LIS ALIBI PEDENDIS[4]

9. On 23 January 2020, Mount Africa issued summons against the Appellant out of the Eastern Cape Local Division of the High Court in Gqeberha, under Case No.132/2020, seeking the following relief:

1.1. That the water verification issued by the Respondent in favour of Mount Africa and the Appellant be confirmed;

1.2. That Mount Africa be entitled to extract 258 335 (129 187.50 x 20) m3 per annum;

1.3. That the parties be directed to by agreement agree on a proper rotation system giving effect to the water allocations, failing which the court is requested to determine the hours of extraction of water by Mount Africa and the Appellant. A copy of the Summons together with Particulars of Claim and annexures are attached hereto marked Annexure “D”.

10. The High Court proceedings referred to above are still pending and have not been disposed of. The summons was issued prior to the lodging of this appeal.
11. There is accordingly litigation pending on the same cause of action in respect of the same subject matter which this tribunal is called upon to determine.
12. In the circumstances, the Appellant’s appeal should be stayed pending the final determination of the action, alternatively be dismissed.

UNREASONABLE DELAY[5]:

13. In terms of Rule 4 (1) of the Rules of the Water Tribunal, an appeal must be commenced within 30 days after:
 - 13.1. Publication of the decision in the Government Gazzette;
 - 13.2. Notice of the decision is sent to the Appellant; or
 - 13.3. Reasons for the decision are given, whichever occurs last.
14. In this matter, there was no obligation to publish the decision in the Government Gazette and the Appellant did not seek reasons for the decision.
15. Accordingly, the Appellant should have commenced this appeal within 30 days from the date on which it was notified of the decision.
16. The Appellant was notified of the impugned decision on 4 February 2020 when the summons under Case No. 132/2020, referred to above, was served in that Mount Africa referred to the impugned decision in its Particulars of Claim and attached a copy of the water use verification of Farm 427 in terms of section 35(4) of the Water Act thereto. A copy of the Sheriff’s return of service dated 7 February 2020 is attached hereto, marked Annexure “E”.
17. The Appellant commenced the appeal on 4 May 2020 when the notice of appeal in terms of 148(1)(e) of the Water Act was lodged with the tribunal. Accordingly, there has been an unreasonable delay in the commencing of the appeal.
18. The Water Tribunal has the power to condone delays if a factual basis has been provided to overlook the delay. However, no factual basis was provided on which the Water Tribunal may overlook the delay.
19. Accordingly the appeal should be dismissed on the basis of unreasonable delay alone.

First Interlocutory Judgement 19 October 2022 Legal questions to be answered

20. Counsel for the Respondent raised three preliminary issues that had to be ventilated before the I could listen to the merits of the case. The three preliminary points have been mentioned in paragraphs 4 to 19 above. In essence, Counsel for the Respondent submitted that the appeal should be dismissed before the merits of the case should be ventilated because of the reasons stated in the Statement of Grounds of Defense which were clearly articulated in the above-mentioned paragraphs. Counsel for the Appellant duly responded in opposing to the dismissal of the appeal based on the preliminary points which were raised by Counsel for the Respondent.
21. After listening to both Counsels, I dismissed the application by Counsel for the Respondent to have the appeal matter being dismissed. I indicated that I will provide the reasons for my decision after the merits of the case would have been ventilated before me. I immediately ordered the expert witnesses of both parties to congregate a pre-trial meeting on the 20 October 2022 with the clear intentions to narrow down the points of disputes so that the main trial should be dealt with as soon as reasonably possible. Both parties complied with my order and the experts met on 20 October 2022 and the minutes were signed by F Joubert on 21 October 2022 and was duly submitted to the Registrar of the Tribunal and all the parties.

Reasons for Judgement

Legal Position and the Powers of the Tribunal

22. Section 148 of the NWA reads as follows regarding appeals to the Water Tribunal:
- (1) There is an appeal to the Water Tribunal –
 - (f) subject to section 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application.
23. The Act states the following regarding the composition of the members of the Water Tribunal in terms of section 146 (3) to (5) of the NWA which reads as follows;
- (3) The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary.
 - (4) Members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge.
 - (5) The chairperson, the deputy chairperson, and the additional members of the Tribunal are appointed by the Minister on the recommendation of the Judicial Service Commission as contemplated in section 178 of the

Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971.

24. The Water Tribunal was formed to be a specialized forum to deal with water-related disputes. The Tribunal can be easily accessed and dispense justice to the affected and interested parties on an expeditious basis. It has been granted broad powers, and it is capacitated by people with special qualifications who are able to deal with the difficult

process of approving water use licence applications. The Respondent erred by submitting that “the Appellant has no locus standi to lodge an appeal against the impugned decision and the appeal ought to be dismissed on this basis alone.”[6] The Appellant is indeed an affected and interested party in this appeal matter. It has a locus standi in this matter because it is affected by the impugned decision of the Respondent.

25. The first paragraph on page 4 of the minutes of the Joint experts meeting dated 21 October 2022, states the following: “The Respondent’s expert explained that the

Respondent’s mandate is water resource management, and accordingly the

Respondent is considering the water resource, in this case the fountain/spring. It is

common cause that both parties abstract water from the same diversion point, i.e. the

beginning/start of the pipeline, and in that sense, specifically in terms of the water

resource, Farm 421 is not a downstream user. In its own Statement of Ground of

Defense stated that the Appellant owns”. This statement confirms that the

Appellant has locus standi in this matter.

THE POINT IN LIMINE- LIS ALIBI PEDENDIS

26. The Respondent argued that this appeal matter was not supposed to be heard because there is a pending case at the High Court in Gqeberha, under Case No.132/2020, seeking the following relief: “9.1. That the water verification issued by the Respondent in favour of Mount Africa and the Appellant be confirmed.”[7] This application to the High Court by the owners of Farm 427, Mount Africa Trading 1 CC was prematurely taken. The issuance of a Water verification by the Department of Water and Sanitation in terms of section 35 (4) of the National Water Act is an Administrative Action as defined in the Promotion of Access to Justice Act (PAJA).[8]

27. Any party that is affected by the decision of the Department of Water and Sanitation in terms of section 35 (4) of the National Water Act, must first ventilate its case at the Water Tribunal before it approaches the High Court. The Water Tribunal is a specialized forum which is dedicated to deal with any disputes that arise from the decision of the Department of Water and Sanitation in terms of the National Water Act.

water-related appeal matters as a specialized court of first instance, hence its status is compared to that of the Magistrate Court. Section 149 (4) states that “The appeal must be prosecuted as if it were an appeal from a Magistrate’s Court to a High Court”.

29. “In terms of this Act a Water Tribunal was created which ought to have enhanced water security and to have provided a settled forum to adjudicate disputes and to assist in developing the jurisprudence of water law.”[9] The Tribunal is also expected to deal with the water related appeal matters as expeditiously as possible, with the intention to enhance Legal and Policy certainty in the country. The Water Tribunal was established order to provide an “internal remedy” to those aggrieved by certain decisions taken by officials of the First Respondent in terms of the Act, among them the decision to grant or refuse a water use licence.

30. In *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08)

[2009] the Constitutional Court considered the circumstances in which internal remedies must be exhausted before applications for judicial review can be made. It held that-

“[i]nternal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

31. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a “fair” procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.”[10]

32. The proceedings in the Water Tribunal have the status of a Magistrate Court;[11] hence the NWA stipulates that a litigant who is not satisfied with the decision of the Water Tribunal can appeal to the High Court. This unique status of the jurisdiction of the Tribunal was meritoriously articulated by the apex court in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) at paragraph 55: '[O]ur democratic order requires an orderly and fair resolution of disputes by Courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the

rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a Court. Section

34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy”.

33. Tribunals are more accessible and less formal than courts. The members of the tribunal apply the rules of the court and rules of the tribunal in a more relaxed and flexible manner; that is, if rules are not complied with, they look at the effect and severity of the non-compliance in order to proceed to hearing the matter fully.[12]
34. The Koyabe judgement was also quoted with approval Hoexter, Administrative Law in South Africa, 2nd ed at page 63: "Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a calmer, more objective and reflective judgment' in reconsidering the issue".
35. These dicta in Koyabe were quoted with approval by the High Court hearing an appeal from the Water Tribunal in Escarpment Environment Protection Group and Another v Department of Water Affairs and Others[13]. The Court in the Escarpment case used this reasoning to decide that a section 148(1)(f) appeal was available to a person who had lodged an objection to an appeal despite no notice having been given in terms of section 41(4) of the Act inviting objections. The Court interpreted the Act to give effect to the principle that a fair and efficient administrative procedure depends on the widest possible access of parties to an internal remedy provided by statute.
- (i) The Court then relied on a decision of the Constitutional Court to the effect that "the duty to exhaust internal remedies [is] a valuable and necessary requirement in our law"; and that:
- (ii) [u]nless exceptional circumstances are found to exist by a court on application by an affected person, [the Promotion of Administrative Justice Act33], which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.
- (iii) According to the Court, it was "incumbent on the applicants to appeal the decision to the Water Tribunal and to exhaust the internal remedies before approaching this [C]ourt".
- (iv) The purposes of the Act include "promoting equitable access to water" (section 2(b)). Ensuring that disputes relating to the issuing of water use licences are adjudicated as efficiently and cost-effectively as possible is a part of promoting equitable access to water. Interpreting the Act in the light of this requirement, it is clear that that it did not intend for matters of an interlocutory or procedural nature arising during appeal proceedings before the Tribunal to be referred to the High Court. Such an interpretation negates the purpose for which the Tribunal was established.
36. For the reasons I stated in paragraphs 29 to 34, I dismissed the Respondent's application that the appeal by the Appellant should be dismissed on the basis of *lis alibi pendens*. By approaching the High Court before exhausting the internal remedies, especially the Water Tribunal, the owners of Farm 427, Mount Africa Trading 1 CC caused the delay in dealing with this matter.

Second Interlocutory Judgement 30 January 2023

37. The hearing resumed on this day due to the December holidays and the availability of all Counsels for the parties. Counsel for the Appellant applied to have the hearing postponed so that the owners of Farm 427, Mount Africa Trading 1 CC should be joined as a party to the proceedings. Counsel for the Appellant submitted that the owners of Farm 427, Mount Africa Trading 1 CC are interested and affected party in this matter and therefore it will be in the interest of justice that they should be present during the proceedings as a party so that they can also put their part of the case. The application by Counsel for the Appellant was not opposed by the Respondent.
38. I must indicate that the Non-joinder of the owners of Farm 427, Mount Africa Trading 1 CC was raised by the Respondent in the Statement of Ground of Defense. The difference between the submission by Appellant and the Respondent on this item is that the Respondent state the following “In the circumstances, the Appellant’s appeal should be stayed pending the final determination of the action, alternatively be dismissed.”[14] The Respondent’s submission on this item was based on a pending High Court application filed by the owners of Farm 427, Mount Africa Trading 1 CC which was prematurely filed at the High Court before exhausting the internal remedies.
39. Upon approving the application by the Appellant, I then exercised my powers as per the provisions of section 7(1) of Schedule 6 of The National Water Act, 1998 (Act 36 of 1998) and then summoned the owners of Farm 427, Mount Africa Trading 1 CC. The summons were duly served (electronically) to the attorney on records of the owners of Farm 427, Mount Africa, vid. Mount Africa Trading 1 CC. They both complied with my order and attended the hearing which was scheduled for the 22-23 May 2023 in the office of the Department of Water and Sanitation in Gqeberha.

Third Interlocutory Judgement 22 May 2023

40. At the commencement of the hearing on 22 May 2023, I dealt with the issue of the status of the owners of Farm 427, Mount Africa Trading 1 CC in the proceedings. I gave the background around the proceedings at the Water Tribunal, especially the flexibility of its proceedings and its unique. It is common cause that the Appellant lodged the appeal against the impugned decision of the Respondent which decision was in favour of owners of Farm 427, Mount Africa Trading 1 CC. It is in the interest of justice that

anybody who has an administrative that was taken in his/her favour be part of any appeal proceedings as a party to those proceedings and not be relegated to the periphery as a spectator. It was therefore a straightforward decision that I took that Mount Africa Trading 1 CC should be enjoined in the proceedings and be cited as the Second Respondent in this matter.

40. After I have handed down the order that Mount Africa Trading 1 CC should be enjoined as Second Respondent, I then postponed the matter sine die so that the attorney on record of Mount Africa 1 CC should be provided all the recordings and the hearing files so that he should prepare thoroughly for the hearing. At the time the matter was postponed the parties had not addressed me on the merits of the case.

Developments after the hearing in May 2023

41. On 26 June 2023 I received an e-mail correspondence from Mr. P. Bouwer of Bouwer Attorneys. He stated that he was in negotiations with the First Respondent with intention to reach a Settlement in this matter. I welcomed those developments

because if the terms of the mooted Settlement Agreement were to be agreed to by all the parties, I would have then made such a

Settlement Agreement an Order of the Tribunal and the matter would have been concluded.

42. On 28 July 2023 I received another e-mail correspondence from Bouwer Attorneys with a progress report that the parties are still in negotiation, and they were waiting for the First Respondent to provide them with some documents. On 23 August 2023 I received another e-mail correspondence from Bouwer Attorneys which indicated that negotiations between the First and the Second Respondents has reached a stale- mate. Bouwer Attorneys requested that I should provide the parties with alternative dates so that the matter should be proceeded with.

43. On 25 August 2023 I received an e-mailed correspondence from the Appellant's attorney of record that their Counsel will be available only from 10 October 2023. At this stage it was clear that the matter was now ripe for trial.

44. For the reasons that I have espoused above I made the following Interlocutory Rulings in the presence of the parties:

44.1. On 18 October 2022, I dismissed the application by the First Respondent which sought that the appeal matter should be dismissed based on the reasons the First Respondent advanced.

44.2. On 30 January 2023, I ordered that Mount Africa Trading 1 should be summoned to the hearing so that they could be part of the proceedings.

44.3 On 23 May 2023, I ordered that Mount Africa Trading 1 was officially a party to the proceedings and be cited as the Second Respondent.

I hand down the judgement.

Adv. Ntika Maake

Panel member of the Tribunal

15 November 2023

- [1] See page 2 of the Appeal bundle.
- [2] See pages 34 to 3 of the Appeal bundle.
- [3] See page 36 of the Appeal bundle
- [4] See pages 36 to 37 of the Appeal bundle
- [5] See pages 38 to 39 of the Appeal bundle
- [6] See pages 34 to 36 of the appeal bundle.
- [7] See page 36 to 37 of the Appeal bundle.
- [8] Act 3 of 2000.
- [9] E Couzens et al; Water Security and Judicial and Administrative Confusion in South Africa: The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng 2015 ZAGPPHC 211 (17 April 2015)" PER / PELJ. 2017(20) at page 1.
- [10] (CCT 53/08) [2009] at paras 35 to 36.
- [11] Section 149 (4) The appeal must be prosecuted as if it were an appeal from a Magistrate's Court to a High Court.
- [12] Rashri Baboolal-Frank; LLD thesis A critical analysis of tribunals in South Africa to create a harmonised tribunal system. Seehttps://repository.up.ac.za/bitstream/handle/2263/70112/Baboolal-Frank_Critical_2019.pdf. page 62
- [13] (Unreported) case number A665/11; 4535/11 of 20 November 2013, at para 50.
- [14] See page 37 of the Appeal bundle.

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