

SOUTH AFRICA / JUDGMENT

Karan t/a Karan Feedlot v Minister of Water and Sanitation (81265/17) [2019] ZAGPPHC 572 (11 October 2019) [2019] ZAGPPHC 572

COURT

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen

CASE / FILE NUMBER

81265/17

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO.: 81265/17

11/10/2019

In the matter between:

I M KARAN t/a KARAN FEEDLOT

Applicant

and

THE MINISTER OF WATER AND SANITATION

Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

- [1] The applicant seeks an interdict as well as declarators and ancillary relief following on an order by the Supreme Court of Appeal. The applicant alleges that the respondent has failed to comply with the order granted by the Supreme Court of Appeal.
- [2] The dispute at hand relates to the applicant's water consumption from the Suikerbosrand River and amounts charged in terms of the Trans-Caledon Tunnel Authority in respect of such charges and other charges that are levied in respect of the applicant's water usage on the applicant's immovable property, Portion 5 of the Farm

Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng.

- [3] The applicant is the owner of a property known as Portion 5 (a portion of Portion
- 2) of the farm Elandsfontein 412, Registration Division IR. The property is riparian to the Suikerbosrand River and the property is situated at the confluence of the Suikerbosrand River and the Blesbok Spruit. It is upstream of the confluence of the Suikerbosrand River and the Vaal River. In terms of a permit issued under the repealed Water Act, 1956, the applicant is entitled to abstract a maximum of 657 000m³ for industrial purposes and abstract 823 000m³ for agricultural purposes.
- [4] In terms of the provision of section 22(1)(a)(ii) of the National Water Act, 1998, the applicant is an existing water user and exercises his existing right as a lawful water user during the qualifying period. The applicant has registered his existing lawful water use in terms of the regulations promulgated by the respondent in terms of section 26(1)(c) of the National Water Act.

“(a) In terms of permit number B2/2/16 (3062) dated 28 September 1993, the applicant is only liable to pay irrigation water use charges;

- (b) The applicant is not liable to pay Trans-Caledon tunnel Authority Charges for the applicant's existing lawful water use in terms of permit B2/2/16 (3062) dated 28 September 1993;
- (c) That the respondent be ordered to pay the cost of this application.”
- [6] The respondent applied and was granted leave to appeal to the Supreme Court of Appeal. That appeal was heard on 9 October 2015. The Supreme Court of Appeal granted the following order:

“(1). The appeal succeeds to the extent set out in the varied order, with costs, including the costs of two counsel.

- (2). The order of the court a quo is varied by deleting paragraph 1 thereof.”

- [7] Both parties applied for leave to appeal to the Constitutional Court which refused leave in respect of both parties.
- [8] It is submitted on behalf of the applicant that the effect of the finding and the varied order of the Supreme Court of Appeal is that the applicant is not liable for the payment of Trans-Caledon Tunnel Authority charges for the applicant's existing lawful water use in terms of permit B2/2/16 (3062) dated 28 September 1993. I agree with that submission.
- [9] The applicant's non-liability to pay Trans-Caledon Tunnel Authority charges is finally decided by the Supreme Court of Appeal. That issue is *res iudicata* between the parties.
- [10] The application is brought in two parts. The first part, A, is only relevant in these proceedings. That part entails relief sought in prayers 1 through to 10 of the notice of motion. The relief sought in Part B, the second part, is to be postponed *sine die*.
- [11] In respect of the relief sought in part A, the applicant seeks in addition relief as set out in prayer 11, the first prayer in respect of Part B. The relief in prayer 11 relates to relief that the applicant is granted leave to apply on the same papers, duly supplemented, for the relief set out under part B, should the respondent not comply with the orders under Part A.
- [12] Prayers 1, 2 and 3 are interdictory relief and prayers 4 to 8 are declarators. Prayer 10 relates to the costs in respect of Part A. The respondent has through its deponent to the answering affidavit conceded the relief sought in prayer 3 of Part A. The relief sought in prayer 3, that is conceded, reads as follows:
- "3. The respondent is forthwith interdicted from levying Trans-Caledon Tunnel Authority charges and any interest in respect of Trans-Caledon Tunnel Authority charges against the water use of the applicant on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg in the Gauteng Province."*
- [13] The dispute that lies at the heart of this application concerns the issue whether the property, the subject of this application, is capable of receiving water from government water works in the Vaal River.
- [14] In this regard, the respondent contends that the applicant receives water from a government water scheme and in particular from the Suikerbosrand River Government Water Control Area.
- [15] The Suikerbosrand River Government Water Control Area was declared in terms of the provisions of section 59(1)(b) of the repealed Water Act as evidenced in Proclamation 257 of 1970 Gazetted on 23 October 1970.
- [16] Section 59 of the repealed Water Act provided as follows:
- "(1) The Minister may, by notice in the Gazette, declare the area defined in such notice, being –*

- (a) an area comprising every piece of land which or a portion whereof is affected or likely to be affected by any Government water work constructed or deemed to have been constructed or in course of construction or intended to be constructed under this Act; or
- (b) an area (which may include non-riparian land) within which the abstraction, utilization, supply or distribution of the water of any public stream should in his opinion be controlled in the public interest, to be a Government

water control area, and may from time to time in like manner amend or repeal any such notice.”

- [17] From a purposive interpretation of the provisions of section 59 of the repealed Water Act, two categories were created.[1] Further in this regard, the Suikerbosrand River Government Control Area falls in the second category, namely a Government Water Control Area declared for the purpose of controlling the abstraction, utilisation, supply and distribution of water in public streams in the area in the public interest. The Suikerbosrand River Government Water Control Area was not an area declared in terms of the provisions of section 59(1)(a) of the repealed Water Act.
- [18] It follows that the Suikerbosrand River Water Control Area was not declared for the purposes of being affected by Government water works or Government Water Schemes. Water to the said area is not provided from a scheme made available by means of Government water works that were constructed, acquired or maintained or controlled by the respondent as defined in section 1 of the repealed Water Act.
- [19] It further follows that a river is not a water work, as it is not constructed, erected or used for the purposes stipulated in section 1 of the repealed Water Act.
- [20] The respondent has not indicated any government water works upstream of the applicant’s property that affects the applicant or the immovable property or that is likely to affect the applicant’s property.
- [21] Failing a declaration in terms of section 59(1)(a) or an identification of a government water works that is likely to affect the applicant’s property, the applicant’s property is not subject to any charges, tariffs or the like that would apply in respect of an area controlled either as declared under section 59(1)(a) of the repealed Water Act or affected by a government water works as defined in section 1 of the repealed Water Act.
- [22] Furthermore, the aforementioned permit issued to the applicant, was issued in terms of the provisions

of section 62(2I)(a)(i) of the repealed Water Act. Permits issued under section 62 of the repealed Water Act was only applicable

to areas that did not receive water from Government Water Schemes and hence fell under the second category of section 59 of the repealed Water Act, i.e. section 59(1)(b) as recorded earlier.

- [23] In terms of Government Notice 2464 of 9 December 1988, the provisions of section 62(2B)(a) were made applicable to the area wherein the applicant's property fell.
- [24] It is not disputed that the respondent had not issued a notice in terms of section 63(1)(b), read with section 63(2), of the repealed Water Act for the area where the applicant's property is situated. It follows that the provisions of section 63 of the repealed Water Act is not applicable in this matter and that the provisions of section 62 of the repealed Water Act find application.
- [25] The repealed Water Act was replaced by the National Water Act, 1998. That Act defines what a government waterwork is as well as what constitutes a waterwork. The first "means a waterwork owned or controlled by the Minister and includes the land on which it is situated." A waterwork is defined that it "includes any borehole, structure, earthwork or equipment installed or used for or in connection with water use." It follows that a river does not fall within the scope of either definition of a government waterwork or a waterwork.
- [26] In terms of the National Water Act, water use charges are determined in terms of the origin of the water used. The computing of charges in respect of water usage from a government waterwork is determined according to different criteria than water usage from a non-government waterwork. Section 21 of the National Water Act stipulates various categories of water use. From a purposive reading of the various categories of water use, it is clear that section 21(a) of the National Water Act, i.e. taking water from a water resource, is of relevance to the present matter.
- [27] Section 21(a) of the National Water Act relates to the "taking of water from a water resource". A water resource is defined in the National Water Act as "water resource includes a watercourse, surface water, estuary, or aquifer". The said Act defines a watercourse to mean:
- “(a) a river or spring;
- (b) a natural channel in which water flows regularly or intermittently;
- (c) a wetland, lake or dam into which, or from which, water flows; and
- (d) any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse,
- and a reference to a watercourse includes, where relevant, its bed and banks”.
- [28] It follows that in the present instance the Suikerbosrand River is a watercourse and by definition a water resource. The applicant therefor utilises water from a water resource.
- [29] However, it is a factual question whether water resource development and the use of a waterworks are applicable. The water resource development and the use of the waterworks are only applicable where there are existing waterworks or where the water resource will be

developed by constructing of such government waterworks. It follows that where the water resource does not originate from a waterwork, the applicable pricing strategy and the set criteria in respect of a waterwork do not apply. Likewise, where the water resource is not intended to be developed by constructing of such government waterwork, the pricing strategy and criteria set in respect of government waterwork will not apply. The respondent does not aver that the Suikerbosrand River is intended to be developed by constructing a government waterwork.

[30] The aforementioned instances discussed in the immediately preceding paragraph, i.e. where the

pricing strategy and set criteria in respect of government waterworks, fall clearly within the provisions of Regulation 7. Accordingly, the provisions of Regulation 7 do not apply in the present instance.

[31] It follows that the pricing strategy and criteria set in Regulation 6 find application in the present instance. Thus, the applicant is obliged to pay water use charges set in terms of the provisions of Regulation 6.

[32] Furthermore, the respondent does not allege that there is a Water Users Association from which the applicant receives his water. The applicant's allegation that he exercises his existing lawful water use by directly drawing water from the Suikerbosrand River is not denied by the respondent, nor is any other explanation provided and it follows that this factual allegation is admitted by the respondent.

[33] It follows that the respondent is not entitled to levy any charges or costs falling within the scope of Regulation 7. Neither is it entitled to levy any charges or costs in respect of the Trans-Caledon Tunnel Authority.

[34] The respondent's submission that no prayer was included in respect of an adjustment of tariffs, that it is not obliged to adjust the tariffs in respect of the applicant's water use, has no merit and stands to be dismissed. The respondent is obliged to adhere to any order of Court legitimately granted against it. The respondent, despite the order of the SCA, continued to levy Trans-Caledon Tunnel Authority charges until the date of the application. The applicant is thus entitled to obtain an interdict against the respondent to comply with its obligations.
[2]

[35] The respondent levies consumptive charges for operation and maintenance, depreciation and return on assets in respect of the applicant's immovable property. I have found that the applicant is not liable to pay the said levies due to the fact that section 59(1)(a) of the National Water Act does not apply. The applicant is to be dealt with in terms of the provisions of Section 59(1)(b) of the said Act.

[36] It follows that the respondent is not entitled to levy any charges relating to consumptive charges for operation and maintenance, depreciation and return assets on the applicant's immovable property in respect of the applicant's

water usage. Thus, the applicant is entitled to an order in that respect.

[37] In view of my finding that the applicant derives his water directly from the Suikerbosrand River and not from a waterwork supplied by the State and that no Water Users Association is applicable, and in the absence of any allegation on the part of the respondent that the applicant derives his water from an irrigation board, the respondent has no authority to levy rates and/or charges on water supplied or made available to the applicant as intended in section 11(1) of the Water Research Act, 34 of 1971. The applicant is accordingly entitled to an order in that regard.

[38] The respondent has failed to prove that the defence of *lis alibi pendens* is applicable and puts paid to the applicant's application. The issue in this matter is clearly the non-compliance by the respondent of the SCA court order in respect of the Trans-Caledon Tunnel Authority issue. The respondent's point in limine in this regard stands to be dismissed.

[39] In respect of the respondent's point in limine relating to the relief sought in prayers 4 and 5 of the Notice of Motion and relating to the charging of consumptive, depreciation and return on assets to the applicant, the respondent has not proven that pending litigation on that issue exists. That point stands to be dismissed.

[40] Similarly, the respondent's point in limine relating to the charging of water research charges finds no basis in the instance as no pending litigation has been shown to exist. The point stands to be dismissed.

[41] The respondent's contention that the Prescription Act applies has no merit. The Trans-Caledon

Tunnel Authority charges is vested in the order of the Supreme Court of Appeal and the prescription period in respect of a court order is 30 years. Thus, there is no merit in this point and it stands to be dismissed.

[42] It follows that the applicant is entitled to the relief it seeks.

I grant an order in the following terms:

- (a) The respondent's points in limine are dismissed;
- (b) The respondent is ordered to remove within 60 (sixty) days of this order, all amounts charged in respect of Trans-Caledon Tunnel Authority charges that were levied against the applicant's water use account, with contract number 100005267, in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, in the Gauteng Province;

- (c) The respondent is ordered to credit, within 60 (sixty) days of this order, the applicant's water use account, with contract number 100005267, with all interest erroneously levied against the applicant's account in respect of interest charged in respect of Trans-Caledon Tunnel Authority charges that were erroneously levied against the water use account of the applicant, with contract number 100005267, in respect of Portion 5 of the Farm Elandsfontein 412, Registration

Division IR, District Heidelberg, Gauteng;

- (d) The respondent is forthwith interdicted from levying Trans-Caledon Tunnel Authority charges and any interest in respect of Trans-Caledon Tunnel Authority charges against the water use of the applicant on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District Heidelberg, Gauteng;
- (e) That it be declared that the respondent's charging to the applicant of consumptive charges for operation and maintenance (O&M), depreciation (Depr) and return on assets (ROA) in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng, is contrary to the Pricing Strategy for Water Use Charges and is therefore unlawful;
- (f) That it be declared that the applicant is not liable to pay consumptive charges for operation and maintenance (O&M), depreciation (Depr) and return on assets (ROA) in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng;
- (g) That it be declared that the levying of Water Research Fund Charges in terms of the provision of section 11(1)(b) of the Water Research Act, 34 of 1971 as amended, in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng, is unlawful;
- (h) That it be declared that the applicant is not liable to pay Water Research Fund Charges in terms of the provision of section 11(1)(b) of the Water Research Act, 34 of 1971 as amended, in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng;
- (i) That it is declared that the account opened by the respondent on or about 31 January 2016, with account number 100005280 in respect of the applicant's water use on Portion 5 of the Farm Elandsfontein 412, Registration Division IR, District of Heidelberg, Gauteng, is a duplication;
- (j) The respondent is ordered to pay the cost of Part A of the application;
- (k) In the event that the respondent fails to heed the declarators in prayers (e), (f),

- (g) (h) and (i) above, within 60 (sixty) days from the declarators being granted, the applicant is authorised to approach this court, on the same papers duly supplemented, if necessary, for orders set out in prayers 12, 13,14, 15,16, 17, 18, 19 and 20 of Part B of this application;

[43] Part B, excluding prayer 11, is postponed sine die.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Applicant: A W Rossouw SC

Instructed by:

Jaco Roos Attorneys

On behalf of Respondent: R P A Ramaweale SC

N S Mteto

Instructed by:

The State Attorney

[1] Minister of Water Affairs v Mostert et al 1966(4) SA 690 (AD) at 703H-70H

[2] Setlogelo v Setlogelo 1914 AD 211 at 227

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