

C

DEPARTMENT OF WATER AFFAIRS
ABSENCE OF A DULY APPOINTED CHAIRPERSON OF THE
WATER TRIBUNAL

OPINION
*(AS AMPLIFIED)*¹

- 1 My consultant, the Department of Water Affairs, requests my opinion on legal implications which arise from the absence of a duly appointed chairperson of the Water Tribunal.
- 2 The last chairperson appointed to the current Tribunal, Lepono Lekale (who was the only member who was a legal practitioner), resigned on 31 December 2011 and has taken up a judicial appointment.
- 3 The remaining members of the Tribunal comprise a deputy

¹ This is an amplified version of my original written opinion, furnished on 17 April 2012. Subsequent to my furnishing that opinion, I was provided with additional facts not included in my original instructions. I was asked to amplify my opinion to deal with those additional facts – hence this amplified version.

04011

chairperson and three additional members. None of them has a legal background.

4 The question is whether it is legally permissible for these members of the Tribunal to preside over matters in the absence of a duly appointed chairperson and without such a chairperson allocating those members to preside over specific matters.

5 The Tribunal is a statutory body, established under the National Water Act 36 of 1998 (*the Act*). Accordingly, the Tribunal and its members have authority and powers only to the extent that they have lawfully been conferred on them by the empowering statute.

6 The Act provides in s 146(3) that:

“The Tribunal consists of a chairperson, a deputy chairperson and as many additional members as the Minister [of Water Affairs] considers necessary.”

7 The appointment of the chairperson, the deputy chairperson and the additional members of the Tribunal must take place in accordance with s 146(5) of the Act read with item 3 of Schedule 6. Section 146(5) states:

“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 contemplated in section 178 of the Constitution and the Water Research Commission established by section 2 of the Water Research Act, 1971 (Act No 34 of 1971), in accordance with item 3 of Schedule 6."

In terms of s 146 of the Act, members of the Tribunal "must have knowledge in law, engineering, water resource management or related fields of knowledge."

8 Item 3 of Schedule 6 to the Act sets out various provisions for the process of nominations for and recommendation of potential appointees to the Tribunal. Item 3(6) provides:

"(6) (a) The Judicial Service Commission must recommend at least two persons qualified in law for appointment as chairperson of the Tribunal.

(b) The Water Research Commission must recommend persons qualified in water resource management or engineering or with knowledge in related fields, for appointment as deputy chairperson and additional members of the Tribunal.

(c) The Judicial Service Commission or the Water Research Commission must recommend persons qualified in law, engineering or water resource management for appointment as members of the Tribunal.

04011

recommend at least two candidates for appointment for every vacancy, including that of chairperson or deputy chairperson, where necessary." (emphasis added)

- 9 It is clear from these provisions that the chairperson must be recommended by the Judicial Service Commission and must be qualified in law. The deputy chairperson and additional members must be recommended by the Water Research Commission and must be qualified in water resource management or engineering or have knowledge of related fields.
- 10 The recently departed chairperson was indeed a person qualified in law, while the remaining members of the Tribunal, including its deputy chairperson, are qualified in or have knowledge of other fields.
- 11 There has been no appointment of a new chairperson to replace Judge Lekale since his resignation took effect on 31 December 2011. The Tribunal's remaining members have since then been performing functions, in particular determining appeals or applications, which are subject to the jurisdiction of the Tribunal under the Act. It is not clear by whom they have been purportedly designated to hear such appeals. I assume that they allocate matters amongst themselves.

04011

12 It is clear from the Act and Schedule 6 that it is not necessary for all members of the Tribunal to hear every appeal. Instead, the determination of which member or members of the Tribunal should hear and decide a particular matter is to be undertaken by the chairperson. The Act provides in s 147(1):

“Subject to section 146(4), after having considered the necessary field of knowledge for the purposes of hearing a particular matter, the chairperson may nominate one or more members of the Water Tribunal to hear a matter and a decision by such member or members constitutes a decision by the Tribunal.”

13 That section is complemented by Item 6(1) of Schedule 6 to the Act, which provides:

“An appeal or application before the Water Tribunal must be heard by one or more members, as the chairperson may determine.”

14 Accordingly, the mere fact that a member of the Tribunal has been appointed under the Act as a Tribunal member does not suffice to give authority to such a person to hear and decide a specific appeal or application. Appointment as a member of the Tribunal is a necessary but not a sufficient condition for authority. In addition to membership of the Tribunal, that person must be designated by the chairperson to hear and decide that specific matter.

04011

designation, the chairperson must assess what type of matter it is, what specific field it entails – such as whether it entails a question of law, engineering or water resource management. The chairperson must then make a designation of the member or members of the Tribunal by matching their particular skills (as contemplated in s 146(4) of the Act) with the particular requirements of the specific matter.

- 15 The determination of what type of skills may be required to hear and determine a specific matter may be a complex issue, which the Act and Schedule 6 thereto entrusts specifically and exclusively to the chairperson. It makes eminent sense that this power to allocate should be entrusted exclusively to the chairperson, particularly where the chairperson alone is qualified in law (and where his or her suitability as a lawyer has been determined to the satisfaction of the Judicial Service Commission).
- 16 If there is no chairperson, a Tribunal member may not take it upon him or herself to preside over a particular appeal or application.
- 17 Nor are the remaining members of the Tribunal entitled to choose one of their own number to serve as chairperson and fulfil the specific functions of that office, including the determination of which Tribunal member or members should preside over a particular appeal or application or fulfil the other important functions of the

04011

chairperson, such as making rules governing the procedure of the Tribunal;² granting leave to Tribunal members, failing which they may cease to hold office;³ handling resignations of members and notifying the Minister of this.⁴

- 18 The only lawful means by which a person may be appointed as chairperson is that prescribed by the Act, as considered above – which entails nomination and recommendation by the Judicial Service Commission and appointment by the Minister. There is no provision for the remaining Tribunal members to replace an outgoing chairperson with one of their own members.
- 19 Nor in my view does the Act provide for or permit the deputy chairperson to fulfil the role of chairperson. There is no express provision to that effect. The question which then arises is whether this ought necessarily to be implied in the legislation. In my view there would be no justification for such a necessary implication. Although there is provision for what is referred to as a “*deputy chairperson*”, it does not follow simply from this label that the deputy is entitled to deputise for the chairperson in undertaking such important functions as determining what types of skills are required of a Tribunal member or members to preside over a particular matter, and to designate such member or members for such purpose. This is

² S 148(5)(a)

³ Schedule 6, item 4(1)(b)

⁴ Schedule 5, item 4(2)

04011

particularly so where the chairperson alone is required to be qualified in law. The deputy chairperson does not have to have any legal qualification or skill or to have been recommended by the Judicial Service Commission.

20 I accordingly conclude that in the absence of a replacement chairperson being appointed validly by the Minister (on the recommendation of the Judicial Service Commission as required by the legislation), no other Tribunal member can lawfully be designated to preside over any specific appeal or application. If they were to do so and to purport to make a decision on such appeal or application, they would be acting without authority. In consequence any decision they make would be *ultra vires* and liable to be set aside on review.

21 This is in accordance with the fundamental principle of legality or legal authority, which is an aspect of the rule of law. An administrative functionary may only exercise a power that has lawfully been granted to him or her.⁵

22 I am informed that the remaining Tribunal members have in fact

⁵ Constitution of the Republic of South Africa, 1996, s 33 (which requires that administrative action be lawful); Constitution s 40(1)(f) and (g) (which requires that organs of state must exercise only such powers or functions as are conferred upon them); Promotion of Administrative Justice Act 3 of 2000 (PAJA) s 6(2)(a)(i) and (ii) and (f)(i) (which lay down that administrative action may be set aside by way of judicial review if the person who took the action lacked the legal authority to do); *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2008 (3) SA 91 (EC) para 66; *Mathipa v Vista University* 2000 (1) SA 396 (T); *Mngomezulu v Soweto City Council* 1989 (2) SA 331 (A). In relation to the requirement of legality and the rule of law see *Pharmaceutical Manufacturers Association of SA; In re: Ex parte application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC); *President of the Republic of South Africa v S A Rugby Football Union* 1999 (2) SA 14 (CC).

04011

presided over and decided appeals and applications since Judge Lekale resigned as chairperson and without being designated to deal with a particular matter by a duly appointed chairperson. The consequence of this, in my opinion, is that any purported decision taken by such Tribunal members is susceptible to legal challenge and to be set aside by way of judicial review. However, until an application is brought and such a decision is set aside by a court, such a purported decision, though invalid, would exist in fact and parties would be entitled to act on the strength of that decision until the court sets it aside.⁶

- 23 In the light of the conclusions set out above, there is an urgent requirement that the process laid down in the Act and Schedule 6 item 3 be followed to ensure the valid appointment of a new chairperson by the Minister (after following the process for nominations and recommendation by the Judicial Service Commission).

Paul Kennedy SC

*Chambers
Johannesburg
16 May 2012*

⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (5) SA 1001 (SCA)*