

see how the first Respondent can now contend that the Applicants do not have locus standi when the Applicants furnish their correct names in the application. The Applicants are the two companies mining at the two collieries that are referred to in Annexures "B" and "C" to the founding affidavit.

8.3 The Applicants are entitled to litigate due to their legal personality, and it is not necessary for the Applicants to provide resolutions when they choose to litigate. It is only where the authority of a person purporting to act on behalf of the Applicants is challenged, that it may be necessary to prove that the person was properly authorised. The Applicants are entitled to respond to the challenge of authority, and a resolution of the Executive Committee of the Applicants is annexed hereto as Annexure "N".

8.4 I am advised and submit that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In this matter the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the Applicants. Rule 7 of the Uniform Rules of Court provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who has instituted motion proceedings on behalf of an applicant. The Respondents did not avail themselves of this procedure.

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9.

AD PARAGRAPH 7.3 (PAGE 3 OF THE ANSWERING AFFIDAVIT)THEREOF:

- 9.1 It is specifically denied that this application is not urgent. It is admitted that, on the 20th of September 2012, the Applicants dispatched a letter to the first Respondent with regard to the reinstatement of the Water Tribunal.
- 9.2 On 7 November 2012 the deponent addressed a letter to the Applicants' attorneys, a copy whereof is annexed hereto as Annexure "O". On the third page of this letter it was stated with reference to the criminal prosecution instituted against the Applicants "that the criminal prosecution is justified". It is accordingly clear that the real and present threat of criminal prosecution for non-compliance with the directives and alleged contravention of provisions of the NWA which form the subject-matter of the appeals lodged by the Applicants, renders this application particularly urgent, in particular as regards the relief sought in prayer 2 of the notice of motion. If the appeals were to proceed and be unsuccessful, the instituted criminal prosecution would have no foundation and the threat would be removed.

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9.3 The Applicants' attorney responded to the letter, annexure "O" hereto, by letter dated 9 November 2012, a copy whereof is annexed hereto as Annexure "P". Discussions between representatives of the parties in fact took place on Monday 12 November 2012 with a view to seeking a resolution of the disputes or at least some form of interim relief to the Applicants, but no agreement could be reached. At the very least the Respondent should by this time have agreed to the grant of the relief in terms of paragraph 2 of the notice of motion, and if it had done so, it may have then been unnecessary for the Applicants to proceed to seek any of the further relief on an urgent basis.

10.

AD PARAGRAPH 7.2 (ON PAGE 4 OF THE ANSWERING AFFIDAVIT)

THEREOF:

The deponent on behalf of the first Respondent is stating the obvious. The two directives are annexed to the Applicants' founding papers.

11.

AD PARAGRAPH 7.3 (ON PAGE 4 OF THE ANSWERING AFFIDAVIT)

THEREOF:

The contents of this paragraph are noted.

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12.

AD PARAGRAPH 7.4 THEREOF:

Save to deny that the first Respondent did not have the authority to take a decision not to appoint new members to the Water Tribunal, the contents of hereof are noted.

13.

AD PARAGRAPH 7.5 THEREOF:

Save to deny that the first Respondent has the authority to take a decision to implement mediation as an interim arrangement, the contents hereof are noted.

14.

AD PARAGRAPHS 8 AND 9 THEREOF:

It is denied that the contentions by the deponent on behalf of the first Respondent are correct. It is significant that the first Respondent has not deposed to an affidavit to support the contentions made in this paragraph. If the first Respondent in fact took such a decision on the basis alleged, it appears that the first Respondent does not understand the principle of

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separation of powers or the rule of law, which requires of the Executive and public officials to comply with legislation enacted by Parliament, whether or not they agree with the provisions thereof. Full legal argument in this regard will be addressed to the Honourable Court at the hearing of the application.

15.

AD PARAGRAPH 10 THEREOF:

The contents of this paragraph are noted. The Applicants however deny that legislative amendments to the NWA have any bearing on the Act as it currently reads and the Applicants contend that the first Respondent must comply with the NWA as it currently reads until Parliament has approved the amendment of the National Water Act and it has been signed into law.

16.

AD PARAGRAPH 11 THEREOF:

The contents hereof are noted. It however became clear to the Applicants after the meeting of 30 August 2012 that it serves no purpose to further negotiate with the first Respondent as the first Respondent took unlawful and ultra vires decisions.

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17.

AD PARAGRAPH 12 THEREOF:

The contents of this paragraph are noted. It is however denied that this directive was given to the Applicants on the 9th of September 2012 and the Applicants only received this purported directive on 2 October 2012 as is set out in paragraph 12 of the founding affidavit.

18.

AD PARAGRAPHS 13 TO 16 THEREOF:

The contents of these paragraphs are denied.

19.

AD PARAGRAPH 17 THEREOF:

The contents hereof are admitted.

20.

AD PARAGRAPH 18 THEREOF:

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P

I take note of the contents of this paragraph. I fail to see the relevance of it.

21.

AD PARAGRAPHS 19 AND 22 THEREOF:

The contents hereof are admitted.

22.

AD PARAGRAPH 23 THEREOF:

I take note of the first Respondent's surprise and disappointment, however the first Respondent cannot expect of the Applicants to take part in ultra vires and unlawful processes.

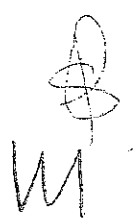
23.

AD PARAGRAPH 24 THEREOF:

It is specifically denied that the Applicants acquiesced in the mediation process.

24.

AD PARAGRAPH 25 THEREOF:



26.1 The contents hereof are denied. In amplification of this denial, the Applicants reiterate that the first Respondent is bound by the provisions of Section 41(1)(d) and (e) of the Constitution which stipulates that all spheres of government and all organs of state within each sphere must be loyal to the Constitution, the Republic and its people and must respect the Constitutional status, institution, powers and functions of government in the other spheres.

26.2 The Applicants are advised that it is not bound by ultra vires administrative actions and need not consent thereto.

25.


AD PARAGRAPHS 26 TO 30 THEREOF:

The contents hereof are denied.

26.

AD PARAGRAPH 31 THEREOF:

It is specifically denied that the first Respondent provided a possible resolution of the disputes. I reiterate that the first Respondent has acted unconstitutionally as set out in paragraph 26 of the Applicants' founding affidavit and that the first Respondent's actions are also ultra vires the NWA.


WY:

Full legal argument in this regard will be addressed to the Honourable Court at the hearing of the matter.

27.

AD PARAGRAPHS 32 TO 34 THEREOF:

I deny that it is imperative for a person who is adversely affected by administrative action to ask for reasons therefore. It is clearly evident from the reading of Section 5 of PAJA that the person may request reasons if he deems it necessary. Where the administrative action is not authorised by the empowering provision of the NWA and if it is as flawed as was set out in paragraphs 31.2 to 31.5 of the founding affidavit, it is not necessary for the Applicants to request reasons and a request for reasons will only be a waste of time.

28.

AD PARAGRAPH 35 THEREOF:

It is specifically denied that the application was brought prematurely and I repeat that to ask for reasons in this instance will be a complete waste of time.

29.

AD PARAGRAPH 36 THEREOF:



It is specifically denied that there is any other internal remedy available to the Applicants as the first Respondent has effectively removed the Applicants' internal remedies by not filling the vacancies in the Water Tribunal.

30.

AD PARAGRAPH 37 THEREOF:

The contents hereof are denied. It is specifically denied that the proposed mediation process constitutes an internal remedy as contemplated in section 7(2) of PAJA. I am advised and submit that an "internal remedy" as contemplated in the section connotes an administrative appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker, or an internal review, which official or tribunal is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits.

31.

AD PARAGRAPH 38 THEREOF:

I take note of the contents of this paragraph but as I have already at length dealt with the question of locus standi I deny that the Applicants do not have locus standi and repeat what has already been stated herein.


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32.

AD PARAGRAPHS 39 AND 40 THEREOF:

The contents hereof are noted.

33.

AD PARAGRAPH 41 THEREOF:

The Applicants take note of the contents of this paragraph. The Applicants however deny that the first Respondent is empowered to appoint mediators as it did and repeat that the first Respondent may only appoint a mediator where the parties have failed to do so. The Applicants further deny that the legal contentions as is set out in this paragraph of the answering affidavit are correct. Full legal argument in this regard will be addressed to the Honourable Court at the hearing of this matter.

34.

AD PARAGRAPH 42 THEREOF:

37.1 I take note of the contents of this paragraph.

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37.2 I however deny the first Respondent's contention that it was never and still is not her intention to deny parties to the mediation process to exercise their rights as provided for in Section 150(4). I reiterate the contentions in paragraph 15 of my founding affidavit.

37.3 An e-mail confirming receipt of Annexure "K" and an undertaking to revert can hardly be seen as a response to Annexure "K" and I reiterate that Annexure "L" was indeed the response of the Applicants to the receipt of Annexure "K".

35.

AD PARAGRAPH 43 THEREOF:

38.1 I take note of the contents of this paragraph. I however deny that the contentions set out therein are correct and I specifically refer the Honourable Court to the provisions of Section 156 of the NWA that provides that the NWA binds all organs of the state.

38.2 I also repeat what was said in paragraph 26 of my founding affidavit, and I deny that the first Respondent had the authority to take the actions that are set out in paragraph 43 of its answering affidavit. It is evident that the response in this paragraph clearly shows that the deponent on behalf of the first Respondent contends that the first Respondent is above the law and also above the Constitution and



therefore may act contrary to the provisions of the Constitution as set out in paragraph 26 of the founding affidavit.

36.

AD PARAGRAPH 44 THEREOF:

It is specifically denied that the mediation process is a forum that is provided for in terms of Section 34 of the Constitution and I reiterate that the first Respondent's inaction has effectively nullified the Applicants' right to appeal and thereby also taken away the internal remedies that were available to the Applicants.

37.

AD PARAGRAPH 46 THEREOF:

The content of this paragraph is denied.

38.

AD PARAGRAPH 47 THEREOF:



41.1 I take note of the contents of this paragraph. I however deny that the Applicants had any other remedy or that the purported mediation process is a remedy that is lawful in terms of the Constitution.

41.2 I repeat that the purported directive in terms of Section 150 of the NWA is ultra vires and unlawful.

39.

AD PARAGRAPH 48 THEREOF:

The contents of this paragraph are denied.

40.

AD PARAGRAPH 49 THEREOF:

The contents of this paragraph are denied. The appeal is not capable of settlement, as the Applicants stand by the correctness of the grounds on which they have appealed against previous directives which form the subject-matter of the appeal. Should the Respondent be of the view that the Applicants' appeals have merit, and wish to avoid having the Water Tribunal to hear the appeals, the Respondent should simply withdraw the directives which are the subject-matter of the appeals.

W

41.

AD PARAGRAPH 50 THEREOF:

The submissions made in this paragraph are incorrect and are therefore denied. There is no reason why the Applicants should take part in an unlawful and ultra vires procedure or submit themselves to an ultra vires and unlawful directive. Even if the Applicants were to agree to participate in mediation, such mediation does not constitute a viable or lawful alternative to an appeal to the Water Tribunal, which is the statutorily established "internal remedy" as contemplated in section 7(2) of PAJA.

42.

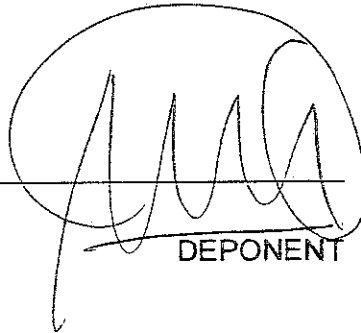
AD PARAGRAPH 51 THEREOF:

45.1 I take note of the contents of this paragraph. I however deny that the balance of convenience does not favour the Applicants. I repeat what was said in paragraph 46 of my founding affidavit.

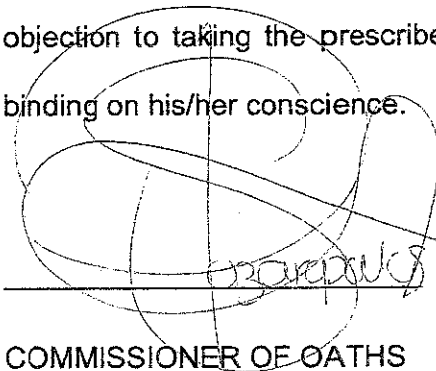
45.2 I repeat that this matter is urgent for the reasons set out in paragraph 47 of my founding affidavit. I have noted that the sub-paragraphs in paragraph 47 of my founding affidavit are erroneously numbered 41.1 to 41.7 and I apologise for any inconvenience this may cause.



45.3 It is specifically denied that the Applicants are not entitled to the relief sought and I repeat that I humbly pray that the Honourable Court grant an order in terms of the notice of motion.


DEPONENT

Thus signed and sworn to before me at Pretoria on this 14th day of November 2012, the deponent having acknowledged that he/she knows and understands the contents of this affidavit, that it is both true and correct to the best of his/her knowledge and belief, that he/she has no objection to taking the prescribed oath and that the prescribed oath will be binding on his/her conscience.


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