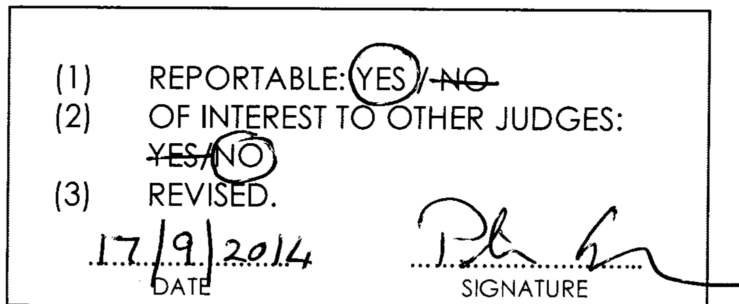
REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA

Case No: 3599/13
Date: 16 September 2014



(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
17/9/2014
DATE
SIGNATURE

In the matter between:

ANDRIES GUSTAV LE GRANGE N.O.
(In his capacity as the duly appointed executor
in the estate of Susanna Maria Van Huysteen) First Applicant

PETRUS JOHANNES VAN BILJON N.O.
(In his capacity as the duly appointed trustee of
THE KROMKUIL TRUST, IT889/1995) Second Applicant

ESTHER VAN BILJON N.O.
(In her capacity as the duly appointed trustee of
THE KROMKUIL TRUST, IT889/1995) Third Applicant

JOHN MORRIS COLLEY VAN DEN BERG N.O.
(In his capacity as the duly appointed trustee of
THE KROMKUIL TRUST, IT889/1995) Fourth Applicant

and

THE MINISTER OF WATER AFFAIRS	First Respondent
THE DIRECTOR: REGULATION AND WATER **NATIONAL DEPARTMENT OF WATER AFFAIRS**	Second Respondent
CHIEF EXECUTIVE OFFICER **OF THE SAND-VET WATER USERS ASSOCIATION**	Third Respondent

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JUDGMENT

LAZARUS AJ

1. This matter concerns a dispute over water rights.

2. The applicants seek the first and second respondents' approval for the transfer of certain water rights which the applicants' allege were allocated to Portion 8 of the farm Plessiesdraai 655, Hoopstad District, Free State Province ("Portion 8"). For that transfer to be approved, the applicants' require the first and second respondents' recognition that the particular water rights constitute existing lawful water uses as contemplated in the National Water Act 36 of 1998 and are thus available to be transferred.

3. The first and second respondents contend that Portion 8 no longer has any entitlement to any water rights that may now be transferred. According to the respondents, the water rights that were originally allocated to the property were permanently transferred in 2001 leaving Portion 8 with no

further water rights. The respondents have accordingly refused to recognise the water rights, which the applicants' allege are still allocated to Portion 8, as existing lawful water rights for the purposes of the National Water Act.

The facts

4. The first applicant is the executor of the estate of Mrs SM van Huysteen which estate is the owner of Portion 8.

5. With the establishment of the Sand-Vet Government Water Scheme in the 1960s, water rights (comprising of an area of land, expressed in hectares, which may be irrigated by means of water from the scheme) were allocated to Portion 8. These rights were to be exercised by means of two pumps, numbered 73 and 111, both situated on the property.

6. Believing that separate water rights had been allocated in respect of each pump Mrs van Huysteen concluded an agreement of sale in August 2001 with the Kromkuil Trust, the owner of the farm Kromkuil 1405, Hoopstad District, Free State Province ('Kromkuil'). The objective of the sale was to transfer the water rights assumed by the parties to have been allocated to pump 73 (namely an allocation of 22.3 hectares of water use) to the Kromkuil Trust for use on the farm Kromkuil.

7. Subsequent to the conclusion of this agreement, a water use licence was granted in November 2001 to the second applicant authorising the use of a certain quantity of water on the farm Kromkuil. It is evident from the licence that it was issued pursuant to the surrender of water rights held in respect of several properties, including Portion 8, as contemplated in section 25(2) of the National Water Act. This section provides that a person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement in order to facilitate a licence application under section 41 of the Act for the use of water from the same resource in respect of other land.

8. In March 2004, Mrs van Huysteen entered into a further agreement with the Kromkuil Trust, the objective of which was to transfer the remaining water rights believed by the parties to have been allocated to pump 111 (namely a further allocation of 22.3 hectares of water use) for use on the farm Kromkuil. Permission for this transfer was requested in correspondence exchanged between the first applicant's attorney and the Department of Water Affairs dating back to 2004.

9. The Department's view, as appears from this correspondence, is that the water rights that were allocated to Portion 8 at the time of the establishment of the Sand-Vet Government Water Scheme in the 1960s, were allocated to the property as a whole and not to particular pumps situated on the property. According to the Department, Portion 8 as a whole had an allocation of 22.3 hectares of water use. This entire

allocation was subsequently transferred to the Kromkuil Trust for use on the farm Kromkuil pursuant to the 2004 agreement referred to above leaving Portion 8 with no other water rights that may be transferred.

10. In May 2008 a formal application was submitted to the Department on behalf of the applicants in terms of section 41 of the National Water Act seeking authorisation for the permanent transfer of 22.3 hectares of water use allegedly allocated to pump 111 on Portion 8 to pump 52 on the farm Kromkuil. Although the application does not expressly refer to section 25(2) of the National Water Act, it is evident that the application was made on the basis of the right contemplated in that section.

11. The application further sought a declaration that the water use allegedly allocated to pump 111 constitutes an existing lawful water use in terms of section 33 of the National Water Act. In light of the view previously expressed by the Department the application further sought to provide proof of the existence of the disputed water rights.

12. After much delay the second respondent finally responded to the applicants' application in November 2010. The response referred solely to the application made in terms of section 33 - to declare the water use on Portion 8 an existing lawful water use. The second respondent advised that the section 33 application had been refused on the basis that there was insufficient evidence of the origin of the water rights in question. No decision was made on the section 41 application although the Department

had previously advised the applicants attorney that a decision would first be made on the applicants' application in terms of section 33 as this decision would determine the outcome of the application in terms of section 41.

13. The second respondent's letter further advised that an appeal against the decision may be lodged with the Water Tribunal in terms of section 148(1)(f) of the National Water Act.

14. Pursuant thereto an appeal was duly lodged in December 2010 on Mrs van Huysteen's behalf against the refusal of the section 33 application. Before the appeal could be heard, however, the operation of the Water Tribunal was suspended in mid 2012 apparently pending legislative amendments to improve its operations. To date the Water Tribunal has not been reconstituted and more than three and a half years have elapsed since the appeal was lodged. Left with no other remedy the applicants approached this court for relief.

15. Before dealing with the merits of the dispute, it is first necessary to consider whether this court has jurisdiction to grant the applicants relief in light of the fact that the dispute is presently before the Water Tribunal and no decision has yet been made in regard thereto.

Does this court have jurisdiction to grant the relief prayed for?

16. Insofar as the applicants' seek the review and setting aside of the decision of the second respondent, the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") are relevant.

17. In particular section 7(2) of PAJA provides as follows:

> *"(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
>
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."*

18. For this section to apply, however, an internal remedy must be available. That remedy, in the case of the National Water Act, is an appeal to the Water Tribunal.

19. Section 148(1) of the Act provides a right of appeal to the Water Tribunal in respect of certain specified decisions or actions of various defined water management authorities. While provision is made in section 148(1)(f) for an appeal "*against a decision of a responsible authority on an application for a licence under section 41 or on any other application to which section 41 applies, by the applicant ...*", no provision is made for an appeal

against the decision of a water management authority pursuant to an application in terms of section 33.

20. An applicant aggrieved by such a decision, in respect of which no right of appeal lies, would therefore be entitled to approach the court directly for the review of such a decision, there being no internal remedy which can first be exhausted.

21. Although the appeal lodged on behalf of Mrs Van Huysteen purports to be an appeal against the second respondent's decision to refuse to declare the water use on Portion 8 an existing lawful water use in terms of section 33 of the National Water Act, it is evident from the grounds of appeal that it was also directed more broadly at the second respondent's failure to approve the applicants' application lodged under section 41.

22. It is evident that the second respondent regarded Mrs Van Huysteen's appeal as being broader than an appeal against the refusal of the section 33 application and regarded the appeal as also being an appeal against the Department's failure to approve the section 41 application. This is clear from the second respondent's advice in its letter refusing the application that an appeal to the Water Tribunal may be lodged in terms of section 148(1)(f) of the National Water Act.

23. Assuming then, that an internal remedy was available to the applicants in the form of an appeal to the Water Tribunal, which remedy the applicants

have exercised, what is to be made of the fact that the Water Tribunal is presently not in operation?

24. In **Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC)**, the Constitutional Court emphasised the importance of the internal remedies:

> *"[35] Internal 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.*
>
> *[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny."*

25. Drawing on international law, Mokgoro J writing for the court explained that in order to count as an existing internal remedy, such remedy must be available, effective and adequate:

> *"[43] In order to qualify as an available remedy, it is the approach of the African Commission that a complainant must have the ability to make use of the remedy in the circumstances of his or her case. Similarly, the Inter-American Commission on Human Rights has interpreted the duty to exhaust domestic remedies as existing only when these remedies formally exist and are adequate to protect the legal interest infringed. They must also be effective to produce the result for which they were intended.*
>
> *[44] In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy be an effective one. A remedy will be effective if it is*

objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct. Factors such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interests of justice to intervene.

[45] Thus, as the international jurisprudence illustrates, judicial enforcement of the duty to exhaust internal remedies, in giving content to the 'exceptional circumstances' exemption, must consider the availability, effectiveness and adequacy of the existing internal remedies."

26. The suspension of the operation of the Water Tribunal has made the internal remedy provided for in section 148 of the National Water Act an ineffective one. In its state of suspension the remedy of an appeal to the Water Tribunal does not provide a complainant with the ability to protect the legal interest infringed. The suspension of the operation of the Water Tribunal means in effect that there is no internal remedy available to a person aggrieved by the decisions or actions of the water management authorities as contemplated of section 148(1) of the National Water Act. There being no internal remedy available, there can be no duty on persons affected by such decisions or actions to first exhaust the remedy provided for in that section before approaching the court directly for relief.

27. Even if I am wrong in concluding that the suspension of the operation of the Water Tribunal is tantamount to the non existence of an internal remedy, I am in any event satisfied that the unavailability of an appeal to the Water Tribunal in the present circumstances satisfies the 'exceptional circumstances' exemption contemplated in section 7(2)(c) of PAJA.

28. In the result I conclude that for so long as the operation of the Water Tribunal is suspended parties, such as the applicants in the present case, who would ordinarily have a right of appeal to the Water Tribunal, may approach the court directly for relief.

The relief sought

29. In their notice of motion the applicants seek an order in the following terms:

> 1. *"That the decision by the 1st respondent alternatively the 2nd respondent not to declare the water use on [Portion 8] an existing lawful water use in terms of the National Water Act be reviewed and set aside;*
> 2. *That a declarator be issued in terms of which the water use in relation to pump 111 exercised on [Portion 8] is declared an existing lawful water use as contemplated in the National Water Act;*
> 3. *An order directing the 1st respondent alternatively the 2nd respondent to issue all licenses and/or authorities relating to the existing lawful use to the 1st applicant in order to enable the 1st applicant to exercise all their rights pertaining to the water;*
> 4. *An order directing the 1st respondent alternatively the 2nd respondent to approve the application for the permanent transfer of water rights relating to pump 111 to the Kromkuil Trust IT.889/1995.*

30. It is not in dispute that with the establishment of the Sand-Vet Government Water Scheme in the 1960s, water rights were allocated to Portion 8 and that these rights were to be exercised by means of two pumps, numbered 73 and 111. In their papers the applicants' contend that each of these pumps was allocated 22.3 hectares of water use.

31. The applicants acknowledge that an allocation 22.3 hectares of water use was transferred from Portion 8 to the Kromkuil Trust in 2001. They allege however that this transfer was only in respect of the water use allocated to pump 73 and did not affect the water use that was allocated in respect of pump 111.

32. The applicants thus argue that the water use allocated to pump 111 constitutes an existing lawful water use as contemplated in the National Water Act and is available to now be transferred to the Kromkuil Trust.

33. An existing lawful water use is defined in section 32(1) of the National Water Act (in relevant part) as a water use –

> *(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which –*
>
> (i) was authorised by or under any law which was in force immediately before the date of commencement of this Act; ... or
>
> *(b) which has been declared an existing lawful water use under section 33.*

34. At the hearing of this matter, the applicants' counsel confirmed that the decision which the applicants seek to have reviewed and set aside is the second respondent's decision of November 2010 to refuse to declare the water use on Portion 8 an existing lawful water use in terms of section 33 of the National Water Act.

35. Section 33 provides for the declaration of water use as existing lawful water use. It provides as follows:

> *(1) A person may apply to a responsible authority to have a water use which is not one contemplated in section 32(1)(a), declared to be an existing lawful water use.*
>
> *(2) A responsible authority may, on its own initiative, declare a water use which is not one contemplated in section 32(1)(a), to be an existing lawful water use.*
>
> *(3) A responsible authority may only make a declaration under subsections (1) and (2) if it is satisfied that the water use-*
>
> *(a) took place lawfully more than two years before the date of commencement of this Act and was discontinued for good reason; or*
>
> *(b) had not yet taken place at any time before the date of commencement of this Act but -*
>
> *(i) would have been lawful had it so taken place; and*
>
> *(ii) steps towards effecting the use had been taken in good faith before the date of commencement of this Act.*
>
> *(4) Section 41 applies to an application in terms of this section as if the application had been made in terms of that section.*

36. A declaration of a water use as an existing lawful water in terms of section 33 may only be made in two instances:

36.1. Firstly, if the responsible authority is satisfied that the water use took place lawfully more than two years before the date of commencement of this Act (ie before October 1996) and was discontinued for good reason; or

36.2. Secondly, if the responsible authority is satisfied that the water use had not yet taken place at any time before the date of commencement of this Act but would have been lawful had it so taken place and steps towards effecting the use had been taken in good faith before the date of commencement of this Act.

37. Having regard to the applicants' version of events, it is evident that neither of these preconditions were satisfied in regard to any of the water use on Portion 8. According to the applicants the water use allocated to both pumps 73 and 111 was exercised within the two years immediately before the date of commencement of the National Water Act (ie between October 1996 and 1998) and was never discontinued.

38. In support of its claim that pumps 73 and 111 were each allocated 22.3 hectares of water use, the applicants rely on the fact that they received water accounts from the Department of Water Affairs reflecting amounts due in respect of both pumps which accounts they allege were duly paid. In respect of pump 111 the invoices date from July 1996 to November 1999 and in respect of pump 73 the invoices date from December 1991 to November 1999.

39. In the premises, the applicants clearly did not satisfy either of the jurisdictional requirements for the declaration of a water use as an existing lawful water use in terms of section 33 and the second respondent was thus justified in refusing the application under that section.

40. If the applicants were able to prove that the water use allocated to both pumps 73 and 111 was exercised within the qualifying period contemplated in section 32 of the National Water Act, their water use would constitute an existing lawful water use in terms of that section. I have accordingly considered whether the applicants have succeeded in demonstrating that more than 22.3 hectares of water use was utilised on Portion 8 during the qualifying period (ie between October 1996 and October 1998).

41. The applicants rely on the water accounts and payments referred to above to demonstrate water use on Portion 8 during the qualifying period. While it indeed appears that separate water accounts were issued by the Department in respect of pumps 73 and 111 during the qualifying period and that these separate accounts reflect 22.3 hectares of scheduled water use, it does not follow that 22.3 hectares of water use was scheduled for or utilised by each pump. Indeed it was conceded by counsel for the applicants at the hearing of this matter that water use in Government Water Schemes, such as the Sand-Vet Government Water Scheme, is allocated to particular areas of land and not to particular pumps.

42. That being the case the fact that the water accounts reflect 22.3 hectares of scheduled water use in relation to particular pumps situated on Portion 8 does not mean that Portion 8 as a whole had been allocated more than 22.3 hectares of scheduled water use. Nor does it demonstrate that more than 22.3 hectares of scheduled water use was utilised on the farm.

43. Having regard to the definition of existing lawful water use in section 32 of the National Water Act, it is clear that the extent of an existing water use is not the use that could have taken place lawfully in the qualifying period but rather the use that actually took place in that period.

44. An exception to this general proposition exists in relation to the use of water in government water schemes and government irrigation schemes - such as the Sand-Vet Government Water Scheme. By virtue of Circular 18 of 2001, published by the Director General of Water Affairs on 26 March 2001, where the extent of land that may be irrigated by means of water from such a scheme has been determined by the relevant authority and allocated for use on a particular property, the extent of the water use so determined is to be treated as an existing lawful water use in terms of section 33 of the National Water Act regardless of whether the water was actually used on that property or not.

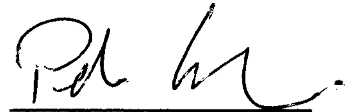
45. As appears from the schedule of rateable areas of the Sand-Vet Government Water Scheme, which specifies the maximum area that may be irrigated by means of water from the scheme, Portion 8 was allocated 22.3 hectares of scheduled water use. There is no indication that it was ever allocated an additional 22.3 hectares of scheduled water use. The schedule also records that in 2001, the allocation of 22.3 hectares of scheduled water use was permanently transferred to the farm Kromkuil and a licence for that use was duly issued. The schedule accordingly confirms that Portion 8 was never allocated more than 22.3 hectares of

scheduled water use and further confirms that the property no longer has any allocated water use that may now be transferred for use on the farm Kromkuil.

46. In the result the following order is made:

46.1. The applicants are entitled to approach this court for relief despite the fact that their appeal before the Water Tribunal has not been finalised.

46.2. The applicants' application is dismissed with costs.



PJ LAZARUS
ACTING JUDGE OF THE HIGH COURT

Case number: 3539/13
Heard on: 14 August 2014

For the Applicants: GJ Scheepers
Instructed by: JAC N Coetzer Inc.

For the Respondents: R Ramawele
Instructed by: State Attorney
Date of Judgment: 16 September 2014