IN THE HIGH COURT OF SOUTH AFRICA

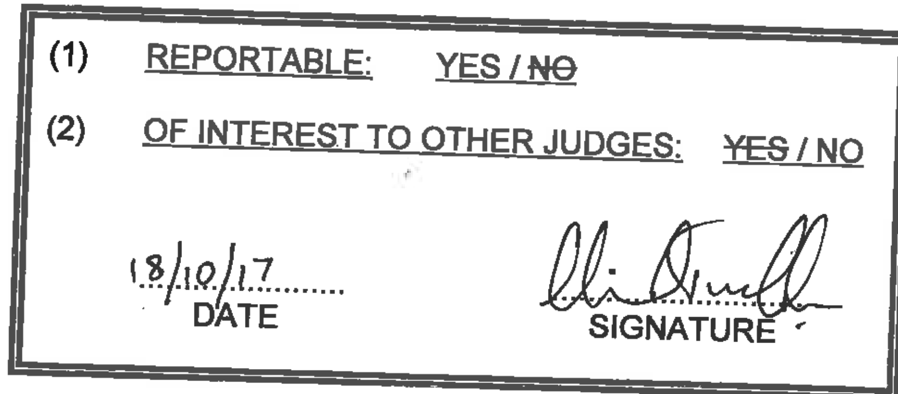
GAUTENG DIVISION, PRETORIA

CASE NO: 18553/12

In the matter between:

REINFORD SINEGUGU ZUKULU | Applicant

and


(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

18/10/17

DATE

SIGNATURE

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS | First Respondent

DEPARTMENT OF ENVIRONMENTAL AFFAIRS | Second Respondent

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED | Third Respondent

MINISTER OF TRANSPORT | Fourth Respondent

N2 WILD COAST CONSORTIUM | Fifth Respondent

JUDGMENT

Tuchten J:

1 On 19 April 2010, the acting Deputy Director-General: ENVIRONMENTAL Quality and Protection (the DDG) granted

eNVIRONMENTAL authorisation under the ENVIRONMENTAL Conservation Act, 23 of 1989 (the ECA) in respect of the proposed N2 Wild Coast Toll Highway (the Project). In so doing, the DDG performed an administrative action as contemplated in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Aggrieved by this decision, 49 appellants lodged internal appeals against the decision. The second respondent (the Minister) considered 26 of these. The appeals she did not consider related to tolling, which required a different adjudication. References to appeals in what follows, are references to the 26 appeals considered by the Minister.

2 The Minister's power to consider the appeals arose from s 35(3) of the ECA which confers a right of appeal in circumstances such as the present on "any person who feels aggrieved at a decision". Section 43(1) of the National ENVIRONMENTAL Management Act, 107 of 1998 (NEMA) provides that "Any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific eNVIRONMENTAL management Act."

3 Section 32 of NEMA confers standing on a wide group of persons to defend what such persons consider to be their eNVIRONMENTAL interests. Section 32(1) provides, under the section heading "Legal standing to enforce eNVIRONMENTAL laws":

> Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific eNVIRONMENTAL management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-
>
> (a) in that person's or group of person's own interest;
>
> (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
>
> (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
>
> (d) in the public interest; and
>
> (e) in the interest of protecting the environment.

4 Thus, any "group of persons" whether incorporated or not, had the right to approach the Minister for relief under s 43(1) of NEMA. I see no reason why the same should not apply to an appeal brought under the ECA.

5 Under common law, an unincorporated group of persons had no right to approach a court except under their own individual names.[1] This principle finds residual effect in the requirement that trustees of a trust approach a court under their individual names, often citing themselves *nomine officii* (NO) to point to their intention to litigate solely in that capacity.

6 The cumbersome effect of this common law principle was mitigated by Rule 14 of the Rules of the High Court, under which a firm, unincorporated association of persons or partnership could sue or be sued under its own name. Similar provisions operate in magistrates' courts.[2] But each of these litigating bodies is required, if asked to do so, to disclose the identities of the human beings or juristic persons who make up their membership. The Constitution in s 38(e) confers standing to enforce constitutional rights on associations acting in the interests of their members. Section 32 of NEMA gives effect in national legislation to this principle.

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1 For a full and, with respect, most useful treatment of this subject, see *Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province* 2010 2 SA 114 ECB, especially para 13.

2 Rule 54 of the Magistrates' Courts Rules.

7 But the owner of a firm and the members of associations and partnerships do not undergo a change of status when hey are cited in this manner. They continue, personally, to be litigants in court cases. This fact is reflected in the consequence that they may, in principle, be liable personally for costs, even if they have acted with scrupulous propriety in the litigation. No order for costs *de bonis propriis* is necessary to fix them with such liability. The special rules for execution against partners in a partnership narrowly so called do not in my view detract from this conclusion.

8 On 26 July 2011, the Minister dismissed the appeals and upheld the decision of the DDG. The Minister provided one set of comprehensive reasons. In her reasons she did not even list the 26 appellants before her. Her reasons commendably dealt with the merits of the appeals. The Minister did not refer in her reasons to even a single factor personal to any one of the 26 appellants.

9 One of the 26 appellants before the Minister was the Baleni Community. The term "Baleni Community" was used in two different senses in the argument before me. In the first, wider, sense, it refers to a grouping of persons who live in villages in a particular geographical area and share certain values. In the second, more narrow, sense, it refers to those persons, members of the Baleni

Community in the wider sense, who grouped themselves together for the purpose of bringing and prosecuting the appeal before the Minister. Not all the persons who were members of the Community in the wider sense were necessarily members of the Community in the narrower sense.

10 The members of the Community in the narrower sense brought the appeal in the interests of the Community in the wider sense. But because they were members of the Community in the wider sense, it follows inevitably that they also brought the appeal in their own interests.

11 The applicant was a member of the Baleni Community in both the wider and the narrower senses. He was a driving force in formulating and advancing the objection to the proposed administrative action and the appeal against the decision. He liaised between the lawyers and the Community. In his mind, he regarded the objection and the appeal as being made on behalf of all the members of the Community in the wider sense.

12 The applicant points out, correctly in my view, that if the names of all those Community members who wished to prosecute the objection and the appeal had been listed in the notice of appeal or if each

Community member had objected or appealed in his or her own mane, it would have made no practical difference. Each of the objections and appeals would have had the same content and the outcome would have been the same: all the appeals would have been dismissed. The only difference would have been that the Minister would have dealt with not the 26 appeals which she considered, properly, together but a number of appeals considerably larger. The Minister would have been fully entitled to ask that the members of the group of persons who styled themselves the Baleni Community for the purpose of the appeal disclose their identities. But the Minister did not do so. She did not do so because the identities of the individual appellants comprising the group which called itself called the Baleni Community and to the other groups of persons who prosecuted such appeals did not matter to the Minister for the purpose of adjudicating the appeals.

13 After the 26 appeals were dismissed, both the applicant and the Baleni Community, and certain other applicants, instituted review proceedings to set aside the decision of the DDG. It is not explained why the applicant decided to review the decision in his own name but I do not think that for present purposes anything turns on this.

14 However, all the applicants for review except the applicant decided to withdraw from the review. That left the applicant as the only applicant in the review.

15 The third respondent (SANRAL) then raised a number of defences adventitious to the merits of the review. As one of these defences, SANRAL asserted in the course of an interlocutory application brought in July 2014 that the applicant had not exhausted his internal remedies flowing from the decision of the DDG and that accordingly he was precluded by the provisions of s 7(2) of PAJA from proceeding with the review.

16 Section 7(2) of PAJA provides:

> (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.

17 At the hearing of this interlocutory application on 6 October 2015, Legodi J made an order by consent between the parties that the applicant would bring an application for a declarator that he had complied with the provisions of s 7 of PAJA or, if he had not , that he should be excused from complying with its provisions. That application, which the applicant launched on 10 December 2015, is presently before me for decision.

18 The applicant, the Minister and the Minister of Transport all briefed counsel to appear at the present hearing. However leading counsel for the Minister and counsel for the Minister of Transport were unfortunately indisposed and could not appear. Junior counsel appeared for the Minister and the Minister of Transport elected to allow the hearing before me to proceed without representation on behalf of the Minister of Transport. The applicant and SANRAL were both represented by counsel. I understood from counsel that the Minister of Transport was content that his interests would be adequately protected by the submissions of counsel for SANRAL. The fifth respondent played no part in the present application.

19 The questions before me are therefore: firstly, whether the applicant has in fact exhausted the internal remedy available to him; and, secondly, if he has not exhausted his internal remedy, whether the circumstances under which the applicant failed to exercise his internal remedy are exceptional and whether it would be in the interests of justice for the applicant to be exempted from the requirement to exhaust the internal remedy imposed by s 7(2)(a) of PAJA.

20 I think the answer to the first question is that by grouping together with the other members of the Baleni Community in the narrower sense, the applicant did not undergo a change of legal personality. He remained an appellant before the Minister in his personal capacity. One can compare the applicant's position with, eg, that of the two Ministers who are respondents in this application. The law treats the Ministers in their capacities as such as legal persons distinct from the individuals who hold office from time to time. If, during the course of litigation, one of the individuals holding the office of Minister resigned and were replaced by another individual, it would not be necessary to seek to substitute the new Minister for the old in the proceedings. In this sense, an office such as that of a Minister, or any other office in one of the tiers of government, is immortal.

21 Counsel for the respondents submitted that the applicant was an appellant in his "capacity as a member of the Baleni Community". So he was, as we use the English language. But then one must ask: what does "in his capacity" mean in that context? In my judgment, it means something different from the position where an individual acts "in his capacity" as, eg, a Minister or another kind of organ of state. If the analysis I undertook above is correct, then so characterising the applicant's participation in the appeal before the Minister indicates his purpose for having acted as he did. Not that his legal personality was changed by what he did.

22 One may compare the applicant's position to another solecism which I have from time to time encountered. A driver of a motor vehicle sued for damage caused by his negligent driving pleads that he is not personally liable because he drove the vehicle "in his capacity as" the employee of another. That relationship does not save the driver from delictual liability. Because regardless of the "capacity" in which he drove the vehicle, he remained personally the driver and thus personally liable for his wrongful act.

23 Similarly, as I see it, the "capacity" in which the applicant appealed to the Minister did not mean that he was not personally a party to the appeal. It would be different, at the level presently under discussion,

if a person consciously elected to have his personal interests advanced by a juristic person with whom he had a relationship[3] and for that reason was content not to be an appellant in his own name. But that is not what happened in the present case. So the distinction, subtle as it possibly is, is decisive in the present context. When the applicant appealed to the Minister in his capacity as a member of the Baleni Community, he did not cease to act in the legal sense in his personal capacity. That in the English language we use the same phrase "in his capacity" to describe the interest which he wished to advance in the appeal is because we do not have language to identify the two different concepts except by exegesis.[4] None of the statutory material to which I have referred required the applicant to identify the "capacity" in which he approached the Minister on appeal and there is no suggestion that he did so.

24 It therefore follows that the first question must be answered in favour of the applicant: yes, he did exhaust his internal remedy and thus has no need of exemption under s 7(2) of PAJA.

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3 Eg a company or an association with juristic personality and perpetual succession.

4 *Martin Heidegger* is reported as having asserted that the business of philosophy cannot properly be conducted in any language other than Greek or German. Where the scholar was accurately reported and whether the assertion is more than mere cultural chauvinism, I am unable to say.

25 The final question is whether, if I am wrong on the first question, the applicant has made a case for exemption under s 7(2) of PAJA. What is the purpose of requiring in principle the prior exhaustion of internal remedies? Internal remedies can constitute immediate and cost-effective relief. The requirement that such remedies first be exhausted promotes the autonomy of the administrative process. Internal appeal tribunals can be staffed by specialist personnel who are better equipped than courts to decide the factual questions which can arise in such matters. Such tribunals can craft fair processes which might in proper cases eliminate the formalism that often attends court procedures. The judicial process can only benefit from the well expressed views of such tribunals on subjects within the special expertise. Analogously with the international law principle to the same effect, the requirement enables the executive to use its own mechanisms to resolve the issue. And thus to use their own access to relevant information and their own familiarities with what may be the technicalities of the dispute.[5]

26 The requirement to exhaust internal remedies must however not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or shield the administrative process

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5 *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae)* 2010 4 SA 327 CC paras 34-41

from judicial scrutiny. Where the pursuit of an internal appeal would be futile, a court may permit a litigant to approach the court directly.[6]

27 Counsel for the applicant referred me to *Earthlife Africa (Cape Town v Director-General: Department of ENVIRONMENTAL Affairs and Another,*[7] where the court held that all things being equal and in case of any doubt in relation to the two criteria in s 7(2), the court should incline to an interpretation of the facts and law which promotes rather than hampers access to court. I respectfully agree. The spirit of s 34 of the Constitution is that courts exist to decide *disputes*. Of course, there must be rules governing how such cases are presented. Sometimes a litigant will fail so signally to implement those rules that the doors of the court have to be closed to him before his dispute is adjudicated. But that is not a desirable outcome.

28 "Exceptional" is not defined in PAJA. Its primary dictionary meaning is "[o]f the nature of or forming an exception; unusual; out of the ordinary; special".[8] What constitutes exceptional circumstances will depend on the facts of the case and the nature of the administrative action at issue.[9]

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6 *Koyabe* paras 38 and 39

7 2005 3 SA 156 C para 44

8 Shorter Oxford English Dictionary, 2007

9 *Koyabe* para 39

29 To my mind, exceptional circumstances have been established. What happened is that sufficient members of the Community (in either sense) decided not to proceed with the review to cause the Community to withdraw from the review. It is unusual and out of the ordinary, indeed not reasonably foreseeable, for such a thing to happen.

30 Important factors in favour of the conclusion that granting exemption would be in the interests of justice are the following:

30.1 The applicant is a member of the Baleni Community in both senses in which I have used the expression. He played a leadership role in the formulation and prosecution of the appeal of the Baleni Community. His own perception was that the appeal was brought on behalf of all the members of the Community. The applicant does not draw the distinction which I do in relation to the two meanings of the expression but that is of no moment. Because he was a member in both senses, he brought the appeal in his own behalf as well as on behalf of the constituency in question.

30.2 The interests of the executive in the exhaustion of the internal remedy have all been served. The Minister has heard the arguments on both sides and has dealt with them on their merits. There is no suggestion at all that the appeal process would have taken a different route if the Minister had known (assuming she did not) that the applicant was a moving force within the Baleni Community or if he had been an appellant in his own personal name. I have pointed to the fact that in her reasons, the Minister did not even list the several appellants who were before her. I do not fault her in this respect. I reach my conclusion precisely because the identities of the numerous individuals who formed the communities and otherwise prosecuted the appeal were of no moment in the Minister's decision making process.

30.3 There was no dilatoriness, negligence or bad faith on the part of the applicant in his efforts to defend his own interests and those of the Community.

31 It was argued on half of the respondents that the fact that the Baleni Community has decided not to proceed with the review should weigh in the assessment of the interests of justice. I do so weigh this factor but find it to be of scant importance. It is the cogency of the

arguments ultimately to be advanced which is important, not the weight of numbers on the side of the person or persons advancing them.

32 Finally, I take into account that it seems to me that the purpose of the resistance to the applicant's placing his arguments on the merits before the reviewing court will serve no purpose other than to thwart the applicant's desire to have his day in court. The absence of the appellant's given name from the roll of appellants before the Minister made no difference at all to the outcome. Nor, if the matter were to go back to the Minister on appeal, would the outcome be any different. I have made the point that the appeals were not adjudicated on the basis of any factors personal to any of the appellants.

33 This is a case, in my judgment, which falls into the category deplored in *Koyabe* para 38: the opposition of the respondent organs of state was designed to frustrate the efforts of an aggrieved person to be heard in court, During argument, I invited counsel for the Minister to agree to her client's giving the applicant an immediate appeal hearing. Counsel declined the invitation. Counsel was alive to the requirement in the applicable Regulations[10] that such appeals must be noted within 30 days of the date on which the decision which is sought to be

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10 The reference is in paragraph 15 of counsel's heads of argument.

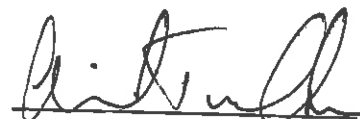
impugned was issued to the prospective appellant. If the applicant now sought to approach the Minister on appeal, he would probably be met with the retort that his appeal was out of time. If exemption is refused, the applicant's long quest for what he considers justice would be over. Not because he has been remiss or has acted improperly, but because through an arid technicality that does not advance any legitimate interest, the doors of the court would be closed to him. That would be most unjust. Were it not that I intend granting an order in terms of the applicant's main prayer, I would have granted the relief sought in the alternative prayer.

34 Costs must follow the result. The employment of two counsel was justified.

35 I make the following order:

1. It is declared that the applicant has exhausted his internal remedy in accordance with s 7(2) of the Promotion of Administrative Justice Act, 3 of 2000.
2. The first, second, third and fourth respondents, jointly and severally, must pay the applicant's costs in the application on the basis that the employment of both senior and junior counsel, where applicable, was justified. Such costs are to

include the costs of the proceedings in this court under the same case number which culminated in the order of Legodi J on 6 October 2015.



NB Tuchten
Judge of the High Court
18 October 2017

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Instructed by:
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