NON-PERFORMANCE OF CONSTITUTIONAL OBLIGATIONS AND THE DEMISE OF THE WATER TRIBUNAL – ACCESS TO JUSTICE DENIED?

1 *Introduction*

This note focuses on two decisions of the North Gauteng high court (*Goede Wellington Boerdery (Pty) Ltd v Makhanya NO* (56628/2010) (2011) (ZAGPPHC 141) and *Exxaro Coal (Mpumalanga) (Pty) Ltd v Minister of Water Affairs* (63939/2012) (2012)) and a decision of the supreme court of appeal (*Makhanya NO and Minister of Water and Environmental Affairs v Goede Wellington Boerdery (Pty) Ltd* (230/2012) [2012] ZASCA 205 (30-11-2012)) (unreported) on the role and manner of functioning of the water tribunal established by the National Water Act 36 of 1998. The water tribunal's main purpose is to adjudicate upon appeals lodged against decisions made and directives issued in accordance with the provisions of the National Water Act. In the *Goede Wellington* high court case, a decision of the water tribunal was set aside on the basis of non-compliance with the rules of natural justice, which decision was confirmed on appeal. In the *Goede Wellington* supreme court of appeal case as well as the *Exxaro* North Gauteng high court case, it was determined that there was no legal basis for the minister of water affairs to direct that an appeal against a decision or directive must be referred to a mediation panel (as provided for in s 150), as the nature of appeals required that the matter could only be heard and finally adjudicated by the water tribunal. In the *Exxaro* case the failure of the minister to reconstitute the water tribunal was found to be unconstitutional and a contravention of the National Water Act. In conclusion a number of implications of the failure of the water tribunal to comply with the principles of administrative law as well as the refusal of the minister to reconstitute the water tribunal are highlighted.

2 *Policy and legal framework*

The policy and statutory framework determining the role, powers and functions of the water tribunal is set out in the 1997 White Paper on Water Policy, the National Water Act 36 of 1998, the National Water Resource Strategy (2004 and 2012) and the 2005 water tribunal rules.

2.1 White Paper on Water Policy (1997)

The objective of the 1997 White Paper on Water Policy was to set out government's policy for the management of both the quality and quantity of South Africa's water resources, and formed part of the process of reviewing the Water Act 54 of 1956 and the practices and institutional arrangements for water management in the country.

With regard to review and appeal mechanisms, the white paper emphasised the importance of policies, institutions and practices to support the principles of equity and equitable access, as well as to protect the constitutional right to procedural fairness and access to courts or other appropriate forums, as contained in section 34 of the constitution. In this regard, the white paper identifies the need for a mechanism for resolving disputes in instances where a water use authorisation is allocated on the basis of competing claims for the same, limited resource.

The white paper also recognised a number of shortcomings with the water courts established in terms of the Water Act 54 of 1956. These included, amongst others, that the water courts had no inherent powers, no criminal jurisdiction and no power

to deal with criminal offences or to review administrative action. In addition, these courts were seen as inaccessible to the public as they were located in urban areas, and the majority of judgments were unreported. The white paper stated that the water courts would be reviewed and replaced with more appropriate legal institutions that are more efficient and accessible. In this regard the white paper mentioned the possible establishment of a specialised natural resources court that would have the mandate to deal with all natural resource and environmental matters.

The white paper envisaged that administrative decisions by officials will, in future, be subject to an appeal to the minister, who will have the power to establish a review committee or to refer an administrative appeal to an advisory committee before he/she makes a decision on the appeal. In instances where the minister's decision is considered to be unacceptable on administrative grounds, the matter may be taken to the high court for judicial review.

Principle 22 of Appendix 1 (Fundamental principles and objectives for a new water law for South Africa) confirms the above, stating that administrative decisions shall be subject to appeal.

2.2 National Water Act 36 of 1998

In order to fulfil the vision contemplated in the white paper and to provide for the fundamental reform of the law relating to water resources, the National Water Act 36 of 1998 (hereinafter the water act) was assented to on 20 August 1998 and commenced on 1 October 1998.

Section 146(1) and (2) establishes the water tribunal as an independent body which has jurisdiction in all the provinces and which may conduct hearings anywhere in the Republic. The tribunal consists of a chairperson, a deputy chairperson and additional members as determined by the minister (s 146(3)), and members must have knowledge in law, engineering, water resource management or related fields of knowledge (s 146(4)). All members are appointed by the minister on the recommendation of the judicial service commission and the water research commission (s 146(5)). The minister may not delegate the power to appoint a member to the tribunal (s 63(2)(*d*)). The nomination of members for appointment to the tribunal is further elaborated on in item 3 of schedule 6 of the act. Subitem 6 states that the judicial service commission must recommend at least two persons qualified in law for appointment as chairperson of the tribunal, and that the water research commission must recommend persons qualified in water resource management, engineering or with knowledge in related fields, for appointment as deputy chairperson and additional members of the tribunal. The judicial service commission or the water research commission, as the case may be, must recommend two candidates for appointment for every vacancy on the tribunal. The minister may, after consultation with the judicial service commission or the water research commission, and subject to providing the member an opportunity to make representations and considering such representations, for good reason terminate the appointment of any member (s 146(8)).

The chairperson may, subject to section 146(4) and after having considered the necessary field of knowledge applicable to a particular matter, nominate a members(s) to hear such matter and make a decision on such matter (s 147(1)).

Section 148 provides for appeals to the water tribunal. Section 148(1)(*f*) provides for an appeal against a decision on an application for a license under section 41. Section 41 deals with the procedure for license applications.

Section 27(1) states that all relevant factors must be taken into account by a responsible authority in issuing a general authorisation or licence (as contemplated in s 41 above), including the following:

(a) existing lawful water uses;
(b) the need to redress the results of past racial and gender discrimination;
(c) efficient and beneficial use of water in the public interest;
(d) the socio-economic impact –
(i) of the water use or uses if authorised; or
(ii) of the failure to authorise the water use or uses;
(e) any catchment management strategy applicable to the relevant water resource;
(f) the likely effect of the water use to be authorised on the water resource and on other water users;
(g) the class and the resource quality objectives of the water resource;
(h) investments already made and to be made by the water user in respect of the water use in question;
(i) the strategic importance of the water use to be authorised;
(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
(k) the probable duration of any undertaking for which a water use is to be authorised.

Section 148(1)(*j*) provides for an appeal to the water tribunal against a directive issued by a responsible authority under section 53(1), by the recipient thereof. Section 53(1) provides as follows as regards the issuing of a directive in the case of an alleged contravention:

> "(1) A responsible authority may, by notice in writing to a person who contravenes-
> (a) any provision of this Chapter;
> (b) a requirement set or directive given by the responsible authority under this Chapter; or
> (c) a condition which applies to any authority to use water,
> direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority."

With regard to appeals from decisions of the water tribunal, section 149(1) provides that a party may, on a question of law, appeal to a high court against a decision, and that the appeal must be prosecuted as if it were an appeal from a magistrate's court to a high court (section 149(4)). Section 68 provides for intervention in litigation by the minister before a court or in a hearing before the tribunal.

Section 150(1) states that the minister may, at any time and in respect of any dispute between any persons relating to any matter, direct that persons concerned attempt to settle their dispute through a process of mediation and negotiation.

2.3 National Water Resource Strategy (2004 and 2012)

Section 5 of the water act provides for the development of a National Water Resource Strategy (the strategy) by the minister, after consultation with society at large. The strategy provides the framework for the protection, use, development, conservation, management and control of water resources for the country as a whole within which

water resources are managed throughout the country. Reviews must take place at least every five years.

The first strategy was released in 2004 (hereinafter the 2004 strategy), and is legally binding in terms of section 7 of the water act. The minister, director-general, other organs of state and water management institutions must give effect to its provisions when exercising any power or performing any duty in terms of the water act.

According to the 2004 strategy, the tribunal is an "independent body with a mandate to hear and adjudicate appeals on a wide range of water-related issues, mainly against administrative decisions made by responsible authorities and water management institutions". The matters on which an appeal can be made are limited to those specified in the act (see s 148 above). The 2004 strategy also states clearly that the Promotion of Administrative Justice Act 3 of 2000 applies to "all administrative actions and reinforces the necessity for water resource managers to apply their minds to every aspect of the decision-making process and to ensure that every relevant aspect is taken into consideration". Lastly, any person who is not satisfied with the tribunal's decision may, on a question of law, appeal against the decision to a high court.

The second (draft) National Water Resource Strategy (the 2012 strategy), released in 2012, makes no mention of appeal procedures or of the water tribunal.

2.4 Water tribunal rules (2005)

The water tribunal rules were published under Government Notice 926 in *GG* 28060 on 23 September 2005, and constitute the procedural rules for the tribunal.

3 Makhanya NO v Goede Wellington Boerdery (Pty) Ltd

3.1 Background

Makhanya NO v Goede Wellington Boerdery (Pty) Ltd ((230/2012) [2012] ZASCA 205) (unreported) revolves on the interpretation of the water act, with specific reference to the administrative law context within which appeals against refusals of an application for a license to use water submitted to the chief director: water use in the (then) department of water affairs and forestry (hereinafter DWAF), now the department of water affairs (hereinafter DWA), should be considered (par 1.2).

3.2 The facts of the case

The applicant (Goede Wellington Boerdery (Pty) Ltd) was the holder of a right to use water from the Berg River to irrigate 102,8 ha of the farm Goede Hoop. ECPA Boerdery (Pty) Ltd (hereinafter ECPA), the owner of a nearby farm was entitled to irrigate 87,3 ha. In July 2005 the applicant and ECPA entered into an agreement for the transfer of 7 ha irrigation water (following the change over by ECPA from sprinkler to drip irrigation). The to be transferred 7 ha irrigation water would be used by the applicant for the irrigation of a new citrus orchard (in respect of which a number of additional permanent employees and some seasonal workers would be appointed). The above agreement was subject to the submission by the applicant of an application in accordance with section 25 of the water act in order to obtain a licence to be issued in accordance with section 41 of the water act (par 4.1-4.7). The application was submitted on 25 November 2005, recommended by the DWAF regional director: Western Cape (par 3.1), but was refused on 11 April 2008 by the

DWAF chief director: water use on account that it "does not fulfil the requirements in terms of section 27(1)(*b*) as it does not promote the redress of past racial and gender discrimination" (par 3.2). On 13 August 2008 the applicant submitted an appeal to the first respondent, the water tribunal, which was dismissed 21 months later by the first respondent in his capacity as additional member of the water tribunal on 5 May 2010 (par 1.3; 3.3-3.4). The application to the high court was also opposed by the second respondent, the minister of water and environmental affairs.

3.3 The court *a quo* (*Goede Wellington Boerdery (Pty) Ltd v Makhanya NO* (56628/2010) 2011 (ZAGPPHC 141))

3.3.1 The legal issues

Following the 5 May 2010 refusal by the water tribunal, on 1 October 2010, the applicant sought an order from the North Gauteng high court in terms of sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review and set aside the 5 May 2010 decision (par 1.2; 3.5) and grant the licence to the applicant (par 1.3). In the alternative, the court was requested to refer the matter back to the water tribunal for reconsideration (par 1.3), and further in the alternative that the court refer the matter back to the water tribunal on the basis that it had misdirected itself by focusing only on the consideration of the factor mentioned in section 27(1)(*b*) of the water act, and not on all the factors enumerated in section 27(1) of the water act, read with item 6(3) of schedule 6 (par 1.3).

The court found that it was common cause that the water act did not provide for a judicial review process (par 1.3). The court then posed the question whether a judicial review "procedure should not be allowed in appropriate cases, especially where the First Respondent [d]oes not oppose the application" (par 2.3-2.3.1), but only opposes an order for costs against the water tribunal (par 2.3.1.1). In this regard, the water tribunal indicated as follows (par 2.3.1.1):

> "I have consulted with the other members of the Tribunal on this application. In general, the Tribunal does not oppose this application, save for the costs order. We are of the view that the appeals of reviews properly made in terms of the applicable legislation or rules should be ventilated in this court. We will therefore *not oppose such applications, appeals or reviews. We will therefore abide the decision of this court. The only issue that is being opposed is the cost order sought against me, alternatively, against the Tribunal*" (court's emphasis).

In addition, the water tribunal conceded that there "might have been incompetency" on its part, but that it should not be blamed as it did not have a "legal expert on board" (par 2.3.1.2). Thirdly, the water tribunal took the view that a judicial review procedure should not be allowed as the water act did not explicitly provide for such procedure (par 2.4).

3.3.2 The judgment in the court *a quo*

As regards the first issue namely the applicability of section 33 of the Constitution of the Republic of South Africa, 1996, dealing with just administrative action, the court specifically refers to section 33(3), which places an obligation on the state to enact national legislation (par 2.5.1):

> "(3) National Legislation must be enacted to give effect to these rights, and must –
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

If, on the face of it, the minister has complied with section 33(3)(*a*) by having created an independent tribunal, the high court would "not easily interfere" with the decisions of such independent tribunal (par 2.5.2). However, the court found that it "can and should interfere" when the water tribunal interpreted the law incorrectly, conceded of having been incompetent and conceded of "not being an expert body for not having a legal expert on board" (par 2.5.2). Within this context the court refers to the constitutional court judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC). The constitutional court indicated that section 6 of PAJA identifies the requirements for valid administrative action (par 24 of the *Bato* decision as quoted in par 2.5.2). As regards the role and interpretation of section 6 of PAJA with reference to the above-mentioned section 33 of the constitution, the constitutional court made the following observation (par 25 of the *Bato* case as quoted in par 2.5.2):

"The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.

The role of a court to intervene in administrative actions is circumscribed by what is known as 'judicial deference' – [i]t ought to be shaped not by unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention" (par 46 of the *Bato* case as quoted in par 2.5.2).

Taking into account the above, the court found that it is allowed to review the water tribunal's decision as the water tribunal admitted the incompetence (for not having a legal expert on board) and the absence of a provision of a review procedure in the water act (par 2.5.3). The court consequently found that "[t]he only conclusion is that there was no Tribunal at all", as the water tribunal should, in addition to being independent and impartial, also "be an expert or at least competent" (par 2.5.3.2).

The court referred to the section 27 of the water act's considerations to be taken into account for the consideration and determination of licensed applications in accordance with section 40 and 41 (par 5.1-5.10). Section 27 determines as follows:

"27. Considerations for issue of general authorisations and licences:

(1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including –
  (a) existing lawful water uses;
  (b) the need to redress the results of past racial and gender discrimination;
  (c) efficient and beneficial use of water in the public interest;
  (d) the socio-economic impact –
    (i) of the water use or uses if authorised; or
    (ii) of the failure to authorise the water use or uses;
  (e) any catchment management strategy applicable to the relevant water resource;
  (f) the likely effect of the water use to be authorised on the water resource and on other water users;
  (g) the class and the resource quality objectives of the water resource;
  (h) investments already made and to be made by the water user in respect of the water use in question;

(i) the strategic importance of the water use to be authorised;
(j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
(k) the probable duration of any undertaking for which a water use is to be authorised."

The court also referred to the fact that the considerations of section 27 of the water act are to give effect to the provision in section 2(c) of the water act that "redressing the results of past racial and gender discrimination" is one of the factors to be taken into account in the sustainable protection and use of South Africa's water resources (par 5.4-5.5).

Section 7 of the water act obliges the minister, the director-general, an organ of state and a water management institution to give effect to the National Water Resource Strategy (hereinafter strategy), which determines in chapter 3 that

> "[a]ll licence applications… must be evaluated against the factors specified in section 27 of the Act. The responsible authority must carefully consider all of these factors to determine the extent to which a proposed water use satisfies the Act's requirements for equity, sustainability and efficiency" (par 5.7).

The court also refers to the need to take into account "the social benefits of the water use, such as the extent to which people depend on water use for employment" (par 5.8).

Section 148(1)(*f*) of the water act makes provision for an appeal against a decision in respect of a section 41 of the water act water licence application to be lodged with the water tribunal (par 5.9).

Schedule 6 (item 6(1)) determines that an appeal lodged with the water tribunal must be heard by one or more of its members. Such appeal takes the form of a re-hearing (item 6(3)), and provision is made for the water tribunal to receive evidence (par 5.10).

3.3.3 The order in the court *a quo*

In *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* (2006 2 SA 311 (CC) (par 530)) the constitutional court indicated that the relevant officials (including the minister) "must apply their minds to all relevant and material information placed before them". They must properly evaluate such information and attach such weight to it as the degree of its importance requires.

The applicant's submission was, amongst others, that the water tribunal's decision was materially influenced by an error of law in that the water tribunal was (erroneously) of the view that all eleven considerations of section 27(1) of the act are subsumed in the overriding consideration of section 27(1)(*b*) of the need to address past racial and gender discrimination (par 6.5-6.6), and thus the water tribunal could not be said to have applied its mind properly (also within the context that parts of its decision had been copied from an earlier unrelated appeal decision) (par 6.7.1-6.7.2). The court agreed with his submission, and found as follows:

1 A judicial review should be allowed (par 9.1).
2 The mistaken interpretation of section 27(1) resulted in the water tribunal committing an error of law, and consequently the water tribunal cannot be said to have considered all relevant factors as required by section 27(1)(*a*) – (*k*) (par 9.2). (This was also the case when the original decision was made by the chief director (par 9.3).)

3 In addition, this indicated that the water tribunal had not applied its mind properly (par 9.4).
4 It was also questionable whether the water tribunal had applied its mind, taking into account the use of copied parts of a previous decision (par 9.5).

Consequently, the court set aside the 5 May 2010 water tribunal's decision (par 9.6) and then discussed whether the matter should be remitted to the administrator concerned (in accordance with section 8(1)(*c*)(i) PAJA) or in exceptional cases substituted by the court (in accordance with section 8(1)(*c*)(ii)(aa) PAJA).

The court agreed with the applicant's view that the court should substitute its decision for that of the water tribunal and consequently granted the application for the licence (par 9.10; 10).

In conclusion, the court awarded costs against the first and second respondents in view of the fact that the water tribunal as an independent tribunal should (a) possess expertise (or at the very least, competency); (b) follow "the correct interpretation of the law"; (c) should apply its mind properly to the matter that has to be adjudicated; and (d) obtain legal expertise on the board when realising that such expertise is required (par 9.11.3-9.11.4).

3.4 The judgment of the supreme court of appeal

The high court decision in the *Wellington* case was taken on appeal to the supreme court of appeal (*Makhanya NO and Minister of Water and Environmental Affairs v Goede Wellington Boerdery (Pty) Ltd*). The first appellant, Makhanya, appealed against the decision of the high court in respect of its order that he was to pay the costs in his official capacity (par 2, 24). The minister lodged an appeal on two grounds: (a) that the water tribunal's decision did not constitute administrative action reviewable in accordance with PAJA, and (b) even if the water tribunal's decision were reviewable, it was not appropriate for the high court to substitute its own decision for the water tribunal's decision; the matter should have been remitted to water tribunal (par 2, 21). The minister conceded that the decision of the chief director who refused the application or licence, constituted administrative action (par 21), and also conceded that an error of law was made by the water tribunal by only focusing on one consideration (par 22).

The decision of the supreme court of appeal consisted of an overview of the background of the case (par 3-11); the proceedings before the water tribunal (par 12-13); the proceedings before the high court (par 14-20) and an overview of the matters on appeal before the court (par 21-25).

The court then dealt with the two matters of substance before the court (as indicated by the minister), namely (a) whether the water tribunal's decision could be reviewed under PAJA, and, if so, (b) whether it could be substituted by a decision of a court a quo (par 26).

As regards (a), the court indicated that the application heard by the water tribunal was in effect a re-hearing of the original application, and "that an application of that nature will ordinarily qualify as administrative action, since the advent of the constitution" (par 27). Taking into account that the role of every tribunal needs to be considered in the context of its own enabling legislation, the court agreed with Hoexter (*Administrative Law* (65)) that the "person or body to whom the appeal is made steps into the shoes of the original decision-maker, as it were, and decides the matter anew" (par 27). It is trite law that the fact that a particular entity which is empowered to perform some functions usually performed by a court of law, is not of necessity then a court of law; "an administrative body can perform the duties

and functions of a court of law without becoming one" (par 28). The supreme court of appeal then referred to a number of factors that are indicative of whether such a tribunal should be regarded as a court of law. In this regard reference was made to the constitutional court's decision in *Sidumo v Rustenburg Platinum Mines Ltd* (2008 2 SA 24 (CC)) where it was found that although there are similarities between proceedings before a court of law and arbitrations by the CCMA, the CCMA cannot be regarded as a court of law, taking into account significant differences (par 28). As regards the water tribunal, the supreme court of appeal emphasised the fact that its members do not have the same security of tenure as judicial officers: "[t]he uncertain tenure of the office of those selected to comprise the tribunal, is not compatible with judicial independence" (par 29). As regards the training of water tribunal members, a number has no training or legal expertise and might be expert in respect of water resource management or engineering without any legal expertise (par 30).

The supreme court of appeal concluded that the water tribunal is indeed "an administrative tribunal which performed an administrative action, as defined in section 1 of PAJA" (par 30). The court also indicated that the nature of the conduct of the water tribunal was administrative, and consequently constituted administrative action (with reference to the constitutional court's decision in *President of the RSA v South African Rugby Football Union* 2000 1 SA 1 (CC) par 141).

The court noted that the minister conceded that the water tribunal made an error of law when considering the redress factor as "essential and decisive, rather than considering all the relevant factors prescribed" in the water act (par 32). The court then investigated whether the decision of the water tribunal could be said to meet the requirement of reasonableness, and within this context, the transformative role of, and need for racial and gender redress (par 33-40). In the absence of a specific express legislative provision that a specific factor should be paramount (par 34), it must be assumed that the factors must all be weighed together:

> "As to the s 27(1)(*b*) requirement itself, our courts recognized that, at least where there is no express legislative provision to the contrary, transformation such as that envisioned in the section can be achieved in a myriad of ways. Indeed, there is no one simple formula to achieve transformation" (par 34).

The court indicated that section 6(2)(*h*) of PAJA makes it clear that an administrative decision is reviewable if such a decision could not be reached by a reasonable decision-maker (par 35 with reference to the *Bato Star* case par 25). The supreme court of appeal also suggested the importance that courts should not overstep the limits of the constitution in the "separation of powers doctrine" (par 36). After stressing that transformation could be perceived in various ways, taking into account the range of factors indicated in section 27(1) of the water act, the court concluded as follows (par 40):

> "The Act provides an open and transparent means by which applications must be assessed. Although much is left to the discretion of the decisionmaker, who is allowed to take factors into consideration not mentioned in the list, it is clear that s 27(b) and indeed the rest of the Act, requires these factors to be assessed by finding an appropriate balance after evaluating all the factors expressly provided for and others. Neither the Act nor the section attributes any significant weight to any of the factors. And, to my mind, a decisionmaker would not be able to add factors to a closed legislative factors, and cannot on a whim decide to elevate one factor to pre-eminence. That this was done is clear from the reasons provided by the Tribunal." (par 40).

The supreme court of appeal thus concluded that the finding of the high court was correct in that the water tribunal's decision not to grant the licence had been unlawful (par 40).

As regards issue (b) – whether the court *a quo* was empowered to substitute its own order for the order of the water tribunal, the supreme court of appeal referred to various options that are available under section 8(1) of PAJA, including remittance to the water tribunal; varying the administrative action concerned; correcting the defect; or substituting its own decision (par 41). As regards substitution, this can only take place in exceptional circumstances (s 8(1)(*c*)(ii)(aa)). With reference to the pre-1996 decision of the Transvaal provincial division in *Johannesburg City Council v Administrator, Transvaal* (1969 2 SA 72 (T)), the court found that, based on the relevant facts, a matter could be deemed to be exceptional when "a court is persuaded that a decision to exercise the power in question should not be left to the designated functionary" (par 43). Such a decision by a court must be informed by established principles and "the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair" (with reference to *Gauteng Gambling Board v Silverstar Development (Pty) Ltd* 2005 4 SA 67 (SCA) par 28). Within this context, the consideration of fairness plays a crucial role; no remittal to the administrative authority concerned will be effected if such remittal would result in procedural unfairness. A second consideration relating to fairness is fairness to the applicant, provided that the court itself is able to make such a decision (par 44). Finally, the supreme court of appeal indicated that the only reasonable decision that could have been reached by water tribunal – if it had considered the appeal in accordance with the act – was that the licence should have been granted. Furthermore, any further delay would result in unjustifiable prejudice to the respondent, as the orchard had been established during a period of six to eight years prior to the court case (par 45). In addition, the court was also informed that the tribunal had been disbanded and that, consequently, any referral to the tribunal would thus be without any effect (par 46). The supreme court of appeal expressed its amazement in strong words that the state attorney had indicated that if a matter were to be referred back to the water tribunal by the court, the matter would be referred internally within department to the mediation panel provided for in section 150 of the water act, the powers of which differ significantly from that of the water tribunal, as "it is aimed at the settling of disputes through a process of mediation and negotiation" (par 47). The supreme court of appeal used the term "astounding" for this approach, as the mediation panel "is not a body appropriate to consider the application for awarding of licences" (par 47). The court confirmed the substitution order made by the high court, whilst also emphasising that considerations of fairness overwhelmingly indicated the need for a speedy resolution of the matter (par 48).

As regards the first appellant's appeal relating to costs having been awarded against him by the court *a quo*, the court found that a cost order should not be made against an official in the absence of *mala fides* or grossly unreasonable conduct (which was not the case in the *Wellington* case), and consequently set aside the order against the first appellant.

4 *Implications of the* Goede Wellington *judgment*

The factors that would indicate when an entity performing a number of functions usually performed by a court of law could itself be classified as a court of law were identified (with specific reference to security of tenure of its members and

legal training). It is evident that the water tribunal does not comply with these requirements.

It is now trite law that the decisions of the water tribunal do indeed constitute administrative action and are reviewable from both a procedural and a substantive perspective. The supreme court of appeal, in evaluating the reviewability of the decision concerned, focused on the reasonableness test as well as the lawfulness and procedurally fair requirements, in addition to established principles.

Only in exceptional circumstances (which also comply with the criteria mentioned in the previous sentence) would the court not refer an invalid decision back to the decision-maker, but substitute its decision for that of the decision-maker. Exceptional circumstances would include, amongst others, the inordinate delay between the original application and the hearing of the appeal, whether the referral back to the decision-maker would result in procedural unfairness, and whether a referral would be without any legal effect (taking into account that the water tribunal was no longer in existence).

The supreme court of appeal expressed itself strongly about the "astounding" decision by the minister that all appeals that should in terms of the water act be lodged with and heard by the water tribunal, would be referred to the mediation panel which, according to the court, is not appropriate.

4.1 Comments on the *Goede Wellington* appeal judgment

AgriSA welcomed the ruling of the supreme court of appeal, stating that the department had followed an approach which embodied its version of black empowerment, which excluded all the other factors listed in the act:

> "The approach followed by the department did not serve the need for effective water use, economic growth and even black economic empowerment. The Appeal court ruling will certainly serve as guidance when the Department of Water Affairs must in future process applications for water transfer."

In its view, the matter had been handled wrongly by the department, and it was unfortunate that it should be subject to a lengthy court process ("AgriSA Appeal Court Ruling on Water Transfers Welcomed" (2012) http://www.agrisa.co.za/Verklarings/2012/2012-12-04.pdf (07-06-2013)).

Gowar stated that the judgment would serve as the reference point for applications for the transfer of water rights in the future, and provides welcome clarity regarding the relevance of empowerment as one of a number of factors to be considered in license applications. In addition, it opens the door for the review of decisions which are not taken on this basis (Gowar "Can water rights be transferred? What do our courts say?" (2013) http://www.polity.org.za/article/can-water-rights-be-transferred-what-do-our-courts-say-2013-02-26 (06-06-2013)).

4.2 Suspension of water tribunal by minister

The chairperson of the water tribunal resigned on 31 December 2011, and the water tribunal subsequently continued operating under the deputy chairperson. The deputy chairperson had no legal background, and the other three members were qualified, or had knowledge, in other fields than law.

Following the decision in the *Goede Wellington* case (relating to the water tribunal not being properly and legally constituted), parties to all other matters pending before the water tribunal challenged its composition and legal competency. In addition, the water tribunal was facing a "challenge of confidence" as a result of

dissatisfaction with its adjudication of disputes (Molewa "Reply by the minister of water and environmental affairs to national assembly question 2280" Morgan for *Written Reply* (24-08-2012)).

The department chief director: legal services came to the conclusion that the water tribunal was not legally competent. This was affirmed in a legal opinion by Kennedy, who concluded that:

> "[I]n the absence of a replacement person being appointed validly by the minister (on the recommendation of the Judicial Service Commission as required in 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", and added "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)". (Kennedy "Opinion for the department of water affairs: absence of a duly appointed chairperson of the water tribunal" par 20-23).

The terms of office of the deputy chairperson and members of the water tribunal came to an end in August 2012.

Since the middle of 2012, the operations of the water tribunal have been held in abeyance pending legislative amendments to improve its operations (Molewa). According to the director of legal services in the department, a new chairperson was not appointed as the minister decided that existing legislation should first be amended. Furthermore, the members' terms have been left to come to an end in order to allow a new water tribunal to be established under the new draft amendment to the legislation (Blaine "Water tribunal suspended after losing chairman" 2012 *Business Day Live* (13-09-2012) http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman (07-06-2013)).

On 24 August 2012 the minister stated that, as an interim solution, a process of mediation and negotiation to deal with the 44 appeals that were still pending (in terms of section 150 of the act) had been initiated (Molewa "Reply by the minister of Water and Environmental Affairs to National Assembly Question 2280" Morgan for *Written Reply* (24-08-2012)). However, DWA in correspondence with Exxaro indicated on 30 August 2012 that 60 appeals were pending – see 5.2 below.

The minister also stated that the Draft National Water Amendment Bill provided for a new process for nomination and appointment of water tribunal members, in which the involvement of the judicial service commission and the water research commission is dispensed with. The Draft Amendment Bill was envisaged to be tabled to cabinet in 2013.

5 Exxaro Coal (Mpumalanga) (Pty) Ltd v Minister of Water Affairs

5.1 Background

In *Exxaro Coal (Mpumalanga) (Pty) Ltd v Minister of Water Affairs* ((63939/2012) (2012)) the North Gauteng high court in an application for a *mandamus* against the minister of water affairs had to decide whether the minister's decision that an appeal against a section 53(1) of the directive to the water act should be referred for mediation in accordance with section 150, within the context of her decision not to appoint a new water tribunal.

5.2 The facts of the case

Exxaro (first and second applicants) applied for a *mandamus* subsequent to having received a directive under section 150 of the water act that its appeal against two directives under section 53(1) had been referred to a mediation panel. The two directives under section 53(1) had been issued by the water act regional office in Mpumalanga to the effect that Exxaro should discontinue contravening section 22 of the water act by using water for mining purposes without the necessary authorisation (par 1, 3 and 6). In the alternative, Exxaro requested the court to order that the directive under section 150(1) of the water act was invalid (par 3).

An appeal against the directive under section 53(1) was lodged by Exxaro to the water tribunal as provided for in section 148(1)(*i*) (par 7). As Exxaro was informed by the department that the water tribunal had been suspended (par 11), it requested the department to appoint a chairperson to, and to reinstate, the water tribunal (par 12). Subsequently the department informed Exxaro that a directive under section 150(1) had been issued, referring the matter to mediation (par 13-17) (which directive had been forwarded to "[a]ll appellants with appeals pending in the water tribunal" – par 16). The directive under section 150(1) stated as follows (par 17): "The operations of the water tribunal are currently placed in abeyance pending a legislative amendment process of the National Water Act and in light of the fact that the term of office of the current water tribunal came to an end in August 2012."

The department also informed Exxaro that on 30 August 2012, 60 appeals were pending before the water tribunal (which no longer existed) (par 34). After a date for mediation had been set down by the department, Exxaro informed the department that it was not submitting to the jurisdiction of the mediation process and that they insisted that the appeal should be heard by the water tribunal (par 19).

5.3 The legal issues

The core issue before the court was whether the mediation process provided for in section 150(1) could be utilised in instances where the water tribunal is dysfunctional or non-existent. Section 150(1) provides as follows:

> "The minister may at any time and in respect of any dispute between any persons relating to any matter contemplated in this Act, at the request of a person involved or on the minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation."

The question was whether an appeal against a directive under section 53(1) to desist from continued contravention of section 22 of the water act could be referred to compulsory mediation under section 150(1) in the absence of a functional water tribunal by means of a directive. Section 53(1) of the water act states as follows:

> "(1) A responsible authority may, by notice in writing to a person who contravenes-
>
> (a) any provision of this Chapter;
>
> (b) a requirement set or directive given by the responsible authority under this Chapter; or
>
> (c) a condition which applies to any authority to use water,
>
> direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority."

Related issues were the constitutional and statutory obligations on the minister to ensure the appointment and continued existence of a functioning water tribunal, as well as the constitutional right (s 34) to a fair hearing.

5.4 The judgment in the *Exxaro* case

The court found that Exxaro had "a right to a fair and expeditious hearing of the appeals according to the constitution" (par 27). The directive under section 150(1) that referred the matter for mediation, was determined to be an administrative action (as provided for in PAJA) – for which, according to the court, the water act made no provision (par 31). This administrative action was thus "influenced by error of law as the mediation cannot replace appeals according to the provisions of the National Water Act" and was a procedure used by DWA "to circumvent the necessity to appoint a water tribunal" (par 31-32). The court concluded that the administrative actions were invalid and *ultra vires* (par 23) as well as unconstitutional and/or unlawful (par 33). The directive under section 150(1) could never replace Exxaro's right of appeal (which was created by section 148(1)(*j*) of the water act) (par 23, 29). The court was of the view that the very nature of the dispute "the existence or then non-existence of a legal right" between Exxaro and the department was such that mediation was inappropriate as a remedy, and that only the water tribunal would be in a position to hear the appeal concerned and "make a binding ruling which would be final" (par 35).

The court made it clear that the minister had not complied with her constitutional and statutory duty to appoint the water tribunal (par 24, 26, 27, 29, 37). Within this context the court expressly referred to section 237 of the constitution which determines that "all constitutional obligations must be performed diligently and without delay" (par 41). The court found that the minister must uphold the rule of law and ensure that she performs her constitutional obligations (par 25). She has no power to decide on her own initiative not to appoint the water tribunal and to replace such tribunal with a mediation panel (par 25). Every exercise of a public power must be in compliance with the constitution as the supreme law and with the doctrine of legality (par 26). Reference was made to item 3 of schedule 6 of the water act which compelled the minister to fill vacancies of the water tribunal (par 24). The conduct of the minister by suspending the water act sections dealing with the water tribunal constituted an intrusion on the exclusive domain of parliament (par 27). The reference made during the case to the upcoming National Water Amendment Bill still waiting to be drafted, was irrelevant as the present water act continued to apply until such time as the envisaged Amendment Bill was enacted, "whether it suits the minister's purpose or not" (par 28).

The court concluded that the minister "did usurp the water tribunal's functions by appointing a mediation panel in its stead and by doing so, ignoring her statutory obligations" (par 49).

5.5 The order in the *Exxaro* case

Although Exxaro applied for a *mandamus* compelling the minister to perform the water act duties as regards the appointment of the water tribunal and "an interdict pending the final determination of the appeals once the water tribunal has been constituted once more" (par 40), the court indicated that it did not want to be seen "to enter into the area where the executive has to comply with legislation" (par 47). Accordingly the alternative, relief was granted that the directives under section 53(1) were to be suspended pending the final determination of the appeal under section

148(1)(*i*) of the water act to the water tribunal (par 50). However, the court indicated that Exxaro could approach the court again on the same papers in the event that the minister did "not rectify the situation within a reasonable time by taking steps to appoint a water tribunal" (par 48).

5.6 Implications of the high court *Exxaro* judgment

The court accepted that the directive under section 150(1) that referred the Exxaro appeal against the directive under section 53(1) (issued in respect of Exxaro's alleged contravention) was an administrative action, which was reviewable in terms of PAJA. This directive under section 150(1) that referred the matter to the mediation panel was *ultra vires,* unconstitutional, unlawful and thus invalid (as this was contrary to the express wording of the water act).

Appeals against directives under section 53(1) can only be adjudicated by the water tribunal, whose decision is final and binding (subject to an appeal under section 149(1) to a high court). There is no legal basis for the minister to suspend or extinguish the statutory right of appeal to the water tribunal (as provided for in section 148(1) of the water act).

The court expressed its misgivings in respect of the refusal by the minister to appoint the water tribunal. Such refusal was contrary to the clear wording of the water act, which imposed the compulsory exercise of a public power on the minister. Non-compliance with this statutory duty constituted non-compliance with both the constitution as the supreme law and the doctrine of legality. The suspension by the minister of the sections dealing with the water tribunal was likewise found to be unconstitutional and invalid, as it constituted an intrusion on the exclusive legislative powers of parliament.

5.7 Comments on the *Exxaro* judgment

The judgment was described as a "major blow to the minister", and that the minister has made a mockery of the dispute process in her department by actively allowing the water tribunal's existence to lapse. The proposed mediation process was characterised as "simply absurd", and the minister was called upon to rectify the situation by reappointing a competent water tribunal immediately after the first sitting of the judicial services commission in 2013 (Morgan "Water tribunal: DA welcomes damning judgment against water minister" (2012) http://www.da.org.za/newsroom.htm?action=view-news-item&id=11665 (07-06-2012)).

In its response, the Centre for Environmental Rights (CER) highlighted the fact that the court decided to suspend the operation of the directives issued against Exxaro, something that even the water act does not provide for. This has the effect that Exxaro can proceed with its water use activities without complying with the department's directives, until such time as its appeal can be decided by a reconstituted water tribunal. The CER questioned why Exxaro had been given an advantage it would never have had if the water tribunal was functioning, especially as the company could still bring a review application in the high court to set aside the directives. It expressed the hope that, if the department were to appeal the matter, the supreme court of appeal would take into account the provisions of section 148(2)(*a*) of the water act, which states that an appeal to the water tribunal does not suspend a directive (Centre for Environmental Rights "Looks like the environment may need a legal team" (2012) http://cer.org.za/environmental-law-blog-looks-like-the-environment-may-need-a-legal-team/ (07-06-2013)).

In a press release on 13 December 2012, the department announced that it will appeal the *Exxaro* judgment. The press release stated that the minister had "studied the judgment and is of the view that she acted within her mandate when she suspended the water tribunal following the resignation of its chairperson" in November 2011. The department was of the opinion that the judgment can be "challenged in fact and in law". The department also highlighted the fact that there were severe unintended consequences if the order to suspend the directives is left unattended, with specific reference to Exxaro's continued mining activities on a wetland (Department of Water Affairs "Water affairs department to appeal Exxaro judgment" (2012) http://www.dwaf.gov.za/Communications/PressReleases/2012/ Water%20Affairs%20Department%20to%20Appeal%20Exxaro%20Judgment.pdf (05-06-2013)).

In its response Exxaro indicated that the company would consider its position once it receives the appeal notice, and "remains committed to ensuring its operations comply fully with the law, licence conditions and its environment management policies", while the DA's Morgan noted that: "The minister should rather blame her legal advisers for poor legal advice, as that is what got the department into the situation where the court has suspended particular directives. I do not see how a higher court will come to a different conclusion to the North Gauteng high court on this matter" (Blaine "Molewa to contest tribunal ruling" (2012) http://www.bdlive.co.za/national/science/2012/12/14/molewa-to-contest-tribunal-ruling (06-06-2013)).

The CER reiterated the dangers associated with the suspension of the directives against Exxaro, and stated that the CER would support the minister's appeal, but only with regard to the directives. The CER also urged the minister to appoint a new tribunal chairman on an urgent basis (Blaine).

6 *General discussion*

The non-performance of constitutional and statutory functions and non-execution of duties in this regard by the executive and organs of state also formed the subject matter of a number of high court cases dealing with applications that sought to compel (a) municipalities to provide potable water, and (b) the national and Limpopo provincial department responsible for basic education, to provide school textbooks.

In the North Gauteng high court case of *Federation for Sustainable Environment v Minister of Water Affairs* ((35672/12) (2012) SAGPPHC 128 (10 July 2012), 140 (26 July 2012), 145 (03 August 2012) and 170 (15-08-2012)), the district municipality was ordered to provide temporary potable water in accordance with the regulations relating to compulsory national standards and measures to conserve water (GN 509 in *GG* 22355 of 08 June 2001) within 72 hours. In addition, it was also ordered to engage actively and meaningfully with the two applicants (par 26). The district municipality was found to be responsible for the making available of potable water. The court referred to the Water Services Act 108 of 1997, the water act and the following provisions of the constitution: section 154 (National and Provincial Government obliged to support and strengthen municipalities; section 152(1)(*d*) (five objects of Local Government), and section 27 (right of access to sufficient water) (par 12-18). On 7 August the court dismissed an application of the respondents in the 10 July 2012 case for leave to appeal against the interim order granted on that date, on account of that "an interlocutory order of execution [is] generally considered not to be appealable, because granting leave to appeal will defeat the very purpose of the order of execution" (par 10 and 16 with reference to *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) par 10) (*TAC 2* case)). Notwithstanding the 10 July 2012 (interim) and 26 July 2012 (final) judgments, potable water fit for

human consumption was *still not* being supplied on a regular basis (par 20). The court (with reference to s 173 of the constitution) expressed its view as follows:

> "Good governance requires that such possibilities (communities registering their dissatisfaction over service delivery and resorting to a chaotic and uncontrolled destructive frenzy) should be averted and the courts should not refrain in ordering those structures of governance in taking positive steps aimed at achieving this, inter alia, and the progressive realization of the ethos enshrined in the constitution."

The high court (par 16) also based its decision on *Minister of Health v Treatment Action Campaign (No 1)* 2002 5 SA 703 (CC) (*TAC 1* case par 5 and 12) where the constitutional court indicated that "[s]ection 38 of the constitution empowers a court to grant appropriate relief where it concludes that a breach of a person's rights under the Bill of Rights has been established".

In *Section 27 v Minister of Education* (2013 2 SA 40 (GNP)) the North Gauteng high court found that the failure by the Limpopo department of education and the department of basic education to provide school text books constituted a violation of the section 29 constitution right to basic education (par 32). As regards the nature of the remedy, the court stated as follows:

> "In this regard it must be abundantly clear that where a violation of rights had taken place, the remedy that was offered had to be effective and meaningful. If not, it rendered the vindication of rights rather hollow, and a court in this regard had to act in the spirit of the Constitution and ensure that when rights were vindicated, remedies were appropriate to meet the mischief being dealt with" (48I par 35).

The court accordingly ordered (par 43) the respondents to commence and conclude, within a period of 15 days, the provision of text books to schools in Limpopo which had not received the books required, and to develop (and submit to the court and the applicants) a "catch-up / remedial" plan for the grade 10 learners in Limpopo who did not have access to text books within one week, and implement same during the period 15 June 2012 to 30 December 2012 (with monthly reports to be submitted from 30 July 2012-30 November 2012). See also the *TAC 1* and *TAC 2* cases where the constitutional court referred to instances where a court may consider to issue an order compelling the executive to perform specific acts.

Section 34 of the constitution (access to courts) guarantees the right to have any dispute resolved before a court of law or another independent and impartial tribunal or forum: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

According to the *Exxaro* case, the minister of water affairs has infringed the constitutionally guaranteed fundamental right of access to courts or an independent tribunal (or forum) by suspending the operations of the water act sections providing for the water tribunal and not taking immediately the necessary steps of reconstituting the water tribunal. With reference to the *TAC* cases and the above-mentioned water and education cases, it may be argued that it was within the power of the high court in *Exxaro* to (a) direct the minister to re-establish the water tribunal within a reasonable time; (b) find that all current (and future) referrals to mediation are invalid, and (c) make an order that pending such reestablishment, parties who have lodged an appeal to the water tribunal, may request the high court to adjudicate upon and make final binding decisions on such appeals. (See in respect of s 34 the following cases: *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association intervening)* 2002 1 SA 429 (CC);

Zondi v MEC for Traditional and Local Government Affairs 2005 3 SA 589 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC); *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC); and *Risk v Ombud for Financial Services* (38791/2011) (2012) ZAGPPHC 199 (7 Sept 2012)).

Within this context, the reference in the *Exxaro* case to section 237 of the constitution (diligent performance of obligations) is of singular importance as it focuses on the constitutional duty of the state and all its organs (including political and administrative office bearers) to execute their duties: "All constitutional obligations must be performed diligently and without delay." Non-compliance with section 237 (also read with s 2 (supremacy of the constitution), s 7(2) (duty of state to respect, protect, promote and fulfil the rights in the bill of rights) and s 8(1) (bill of rights binds the executive and all organs of state)) should also be utilised as a legal basis empowering courts to compel functionaries to comply with both the constitution and other legislation. (See in respect of s 237 the following cases: *Concor Holdings (Pty) Ltd v Minister of Water Affairs and Forestry* (16947/2001) (2006) ZAGPHC 138 (06 January 2006); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC), and *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC)).

7 *Conclusion*

The refusal of the minister to ensure the continuation of the water tribunal by timeously managing the process for the appointment of the members thereof, coupled with her decision to suspend *de facto* the water act sections providing for the water tribunal, was correctly found to be unconstitutional and invalid. The decision to refer all pending appeals to a mediation panel was likewise correctly determined to be without any legal effect. The result of these (invalid) decisions was – and is – to infringe upon the constitutionally enshrined section 34 right to access a court of law (or, in appropriate cases, an independent tribunal or similar forum).

It is to be hoped that a reconstituted water tribunal would comply fully with the constitutional, statutory and common law administrative law provisions, and would implement all judicial precedent relating to the legality and validity requirements for administrative actions, including but not limited to the proper application of the rules of legal interpretation.

The fact that on the date of submission of this note (18 June 2013) no steps have been implemented to ensure the reconstitution of the water tribunal, notwithstanding the 07 December 2012 *Exxaro* decision, raises serious concerns in respect of both the enforcement of court decisions against the executive and the apparent disregard for such decisions by the executive.

Taking into account recent decisions of the constitutional court and a number of decisions from the high courts, it is suggested that it would be legally competent for a court to adjudicate on, and finally decide upon, appeals pending under the water act until such time as the water tribunal has been reconstituted.

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