

Water Security and Judicial and Administrative Confusion in South Africa: *The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng 2015 ZAGPPHC 211 (17 April 2015)*

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Abstract

One of the gravest constraints which South Africa faces in its efforts to promote development and to lift much of its population out of poverty is the relative scarcity of its water. Significant changes were made to South Africa's water law in the 1990s, especially with the promulgation of the *National Water Act 36 of 1998*. In terms of this Act a Water Tribunal was created which ought to have enhanced water security and to have provided a settled forum to adjudicate disputes and to assist in developing the jurisprudence of water law. Instead the Tribunal appears to have created almost as much confusion as clarity before it was dissolved in much uncertainty over whether it would continue in existence or not. A recent judgment in the Gauteng High Court (*Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng*) has created uncertainty by departing from the precedent of a relatively recent judgment in the North Gauteng High Court (*Escarpment Environment Protection Group and Wonderfontein Community Association v Department of Water Affairs and Xstrata Alloys (Pty) Ltd and The Water Tribunal*). In the context of the uncertainty created by the falling into desuetude, at least between 2011 and 2016, of the Water Tribunal, and contradictory indications from National Government, litigants have been forced to seek other fora for remedies. On occasion, courts have been sympathetic and given sensitive judgments – on occasion they have not. Against this background of inconsistent jurisprudence, it is important that there be greater clarity of rights, duties and institutions, and that institutions become settled as soon as possible so that a consistent jurisprudence can begin to emerge in the water rights field. While the situation stabilises, which it is hoped that it will soon begin to do, it is suggested that both courts and government act with circumspection in considering applications concerning water use rights; and be sensitive of the current uncertain circumstances when making decisions. The difficulties of ensuring water security and administrative fairness in South Africa demand nothing less.

Keywords

Escarpment Environment Protection Group case; National Water Act 36 of 1998; Trustees of the Time Being of the Lucas Scheepers Trust case; Water Tribunal.

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1 Introduction

Southern African countries face many environmental constraints, and one of the gravest of these is that of having insufficient water to meet the needs and desires of all users and potential users. The region is generally arid or even water-stressed,¹ is subject to extreme regional and/or economic class differences in access to available water, and faces many compelling arguments from different potential users that they should be allowed access to water. In addition to being arid, the region is also one of those with the greatest imperatives for rapid economic growth in order to lift its inhabitants from poverty. In this context, it is to be expected that numerous tensions will arise (and occasionally need to be settled judicially) in respect of administrative decisions made over access to water. In their efforts to ensure water security by granting appropriate allocations, administrative authorities often are called upon to draw lines without making decisions that are not arbitrary.

South African water law experienced a "sea change" in the late 1990s when, with the promulgation of the *National Water Act* (the NWA),² which repealed the *Water Act*,³ private ownership of water ceased to be permissible; riparian rights ceased to exist; and two users – human beings, for a daily needs component, and the environment itself – became the only "priority users".⁴ This appeared to signal an apotheosis in the state's attitude toward freshwater usage and the rights of people and the environment itself relative to the rights traditionally exercised by the agriculture, industry and mining

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¹ According to the UN Department of Economic and Social Affairs (UNDESA), a water-stressed area is one in which annual water supply drops below 1 700 m³ per person, a water-scarce area is one in which the supply drops below 1 000 m³ per person, and "absolute scarcity" means a supply of less than 500 m³. UNDESA 2014 <http://www.un.org/waterforlifedecade/scarcity.shtml>.

² *National Water Act* 36 of 1998 (the NWA).

³ *Water Act* 54 of 1956.

⁴ NWA, Part 3: The Reserve.

sectors⁵ – the customary heavy users.⁶ Perhaps a little surprisingly, there was no direct constitutional challenge to the legislation, despite the necessity now for users to be permitted to use water that in many cases they had previously had virtually free and unrestricted access to.⁷ Possibly there was no challenge because the NWA made provision for application to be made for previous "lawful uses" of water to continue; and possibly, also, because the authorities were slow to create new Catchment Management Authorities and so, because little changed immediately, no challenge was made. Kidd explains that, while an "important consideration[]" influencing new water policy development was administrative efficiency in the light of likely administrative resource and capacity constraints", it would "clearly not be possible to introduce radical new policy initiatives overnight, which suggested that existing rights might have to be recognized, even if only for a transitional period".⁸

The NWA was promulgated, came into effect, and changes began to be implemented. However, there are still many issues which will need to be clarified. The legislation does not answer all questions relevant to water-use allocations. A number of administrative decisions still need to be made in respect of matters such as revised divisions of Catchment Management Agencies; the determination of ecological reserves for particular areas; and the clarification of the role and place of the Water Tribunal – and clear guidance needs to be given as to the circumstances in which water use rights may be transferred between users. In certain circumstances, the water rights held by certain users may be transferrable to other users – but this is not a blanket allowance.

As the years have gone by and more situations have arisen requiring judicial guidance, a "water jurisprudence" can be seen to have been slowly developing through judicial decisions. A recent judgment delivered by Pretorius J in the Gauteng High Court in the matter of *Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department*

⁵ While it might be pointed out that these could also be characterized as "use for people", it is the Act itself which has drawn the distinction. They might instead be characterised as "indirect uses for people".

⁶ Stewart and Horsten argue that "South Africa is one of the few jurisdictions in the world that provides for an explicit right to water" with s 27(1)(b) of the *Constitution of the Republic of South Africa, 1996* "guarantee[ing] the right to access to adequate water". Stewart and Horsten 2009 *SAPR/PL* 488.

⁷ See, for instance, Kidd, who explains that "private water" was defined in the *Water Act* as "all water which rises or falls naturally on any land or naturally drains or is led onto one or more pieces of land which are the subject of separate original grants, but is not capable of common use for irrigation purposes". Kidd *Environmental Law* 70-71.

⁸ Kidd *Environmental Law* 74.

of *Water Affairs, Gauteng*⁹ provides some guidance on the issue of transferability, and also illuminates some of the dangers which administrative uncertainties pose for equitable decision-making.

2 The application and the facts

Application was made for an order declaring that section 25(1)¹⁰ of the *National Water Act* 36 of 1998 (the NWA) was inconsistent with the *Constitution of the Republic of South Africa*, 1996 – particularly, with the provisions of sections 24, 25, 27 and 39 in the Bill of Rights in the *Constitution* as read with section 195(1)(b). It was argued that section 25(1) of the NWA fails to give effect to the provisions of the Bill of Rights as read with section 195(1)(b).¹¹

The applicant proposed that the Court propose¹² that section 25(1) of the NWA be amended by deleting the word "irrigation" and replacing this with the words "irrigation or for any purpose"; and by deleting the words "for the same or similar purpose" and substituting for them the words "for such purpose as the water management institution may determine".¹³ The applicant asked, in the alternative, that the provisions of section 25(1) of the NWA be referred to the National Legislature for it to "rectify" the section "insofar as it is inconsistent with the provisions of the Bill of Rights".¹⁴

The first applicant is the owner of a farm ("Joffre and the remaining Extent") which is part ("portion 2") of a larger farm ("Denver 1285"). The farm Denver, and therefore its various subdivisions, is not currently allowed to use any water for irrigation purposes from the Vaal River or the Vaal Dam; although Denver had previously been allowed¹⁵ to use¹⁶ and to store¹⁷ public water

⁹ *Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96 v MEC for the Department of Water Affairs, Gauteng* 2015 ZAGPPHC 211 (17 April 2015) (the *Scheepers* case).

¹⁰ NWA, Ch 4 Use of water, Part 1 General principles, s 25 Transfer of water use authorisations: "A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose."

¹¹ *Scheepers* case para [1].

¹² Although not specified, such a proposal would implicitly be to the legislature.

¹³ *Scheepers* case para [2].

¹⁴ *Scheepers* case para [3].

¹⁵ In terms of the *Water Act* 54 of 1956, which was repealed by the NWA.

¹⁶ Where this water was drawn at the rate of 110 litres per second.

¹⁷ A quota of 250 000 m³ was allowed.

drawn from the Vaal River.¹⁸ The owner of the farm "Koppiesfontein",¹⁹ the fourth applicant, received a permit to utilise water²⁰ for industrial purposes. Its intention was to establish a golf course on the property, although it had to date failed to do so.²¹

The first²² and second²³ applicants had entered into an oral agreement with the fourth applicant in terms of which it was agreed that the entitlement which the fourth applicant held to use industrial water would be made available to the first and second applicants for irrigation purposes on the farm Denver, the parties to this agreement being "*ad idem* that the water was suitable for irrigation". The first applicant, with the fourth applicant's assistance, launched an application to the Regional Head for the Department of Water Affairs, Gauteng (the third respondent)²⁴ for the temporary transfer of the water use entitlement from Koppiesfontein to Denver in terms of section 25(1) of the NWA.²⁵ The third respondent declined the application, in November 2011, on the ground that "[t]he NWA makes provision for the temporary transfer of irrigation water use entitlements only".²⁶ The Court then commented that this dismissal of the application "cannot be faulted as s 25(1) does not provide for water being used for industrial purposes to be used for irrigation".²⁷

The Court noted that after the NWA came into operation²⁸ a "verification process" had been undertaken in terms of which the Department had required the applicant to "apply for verification" – the applicant did so apply.²⁹ The Department reached the conclusion, after consideration of the application, that the farm Denver did not have water rights in terms of section 3 of the NWA. According *inter alia* to section 3, "the Minister is ultimately responsible to ensure that water is allocated equitably and used

¹⁸ *Scheepers* case paras [4]-[5].

¹⁹ Merry Mole Developments NO (Pty) Ltd.

²⁰ The entitlement being to draw from the Vaal River/Vaal Dam 2 822 m³ each 24 hours, this amounting to 676 216 m³ per annum, for industrial purposes.

²¹ *Scheepers* case para [6].

²² The Trustees of the Time Being of the Lucas Scheepers Trust, IT 633/96.

²³ The Trustees of the Time Being of the JJ Scheepers Trust.

²⁴ The sixth respondent was the Registrar of Deeds (Bloemfontein).

²⁵ *Scheepers* case para [7].

²⁶ *Scheepers* case para [8].

²⁷ *Scheepers* case para [10]. Per the Court, there "is presently no water on Denver and the pipes laid over Farm Joffre, which is adjacent to the first applicant's farm, have been closed by the third respondent".

²⁸ The NWA commenced on 1 October 1998.

²⁹ Such application being in terms of s 35(1) of the NWA. In terms of s 35(1): "[t]he responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use". *Scheepers* case para [11].

beneficially in the public interest, whilst promoting environmental values".³⁰ However, per the Court, the applicants "chose not to appeal this decision to the Water Tribunal and therefor[e] did not exhaust the internal remedies available before approaching the [C]ourt".³¹

3 Consideration by the Court

The Court then relied on a decision of the Constitutional Court³² to the effect that "the duty to exhaust internal remedies [is] a valuable and necessary requirement in our law"; and that:

[u]nless exceptional circumstances are found to exist by a court on application by an affected person, [the Promotion of Administrative Justice Act³³], which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.³⁴

The Court then identified the instant application as being "not a review application although it is based on a decision which the respondents had taken". According to the Court, it was "incumbent on the applicants to appeal the decision to the Water Tribunal and to exhaust the internal remedies before approaching this [C]ourt".³⁵ The Court explained that as the first and second applicants averred that they had used water before the promulgation of the NWA, they could have applied to have the water use "declared as lawful water use as set out in [s] 35 of" the NWA; that they could have "launched an appeal to the Water Tribunal", but failed to do so; and that they could have "appealed against the decision that the water use was not lawful water use prior to the promulgation of the Act" and have instituted a review application to the Court if the appeal was unsuccessful.³⁶ The Court then noted that the agreement entered into between the first and second applicants and the fourth applicant had not been approved by the Department "as it is contrary to the peremptory provisions of" the NWA – the applicants conceding that as section 25(1) relates only to water used for irrigation purposes, and not to water for industrial purposes, section 25(1) and the agreement were contrary to each other.³⁷

³⁰ *Scheepers* case para [12].

³¹ *Scheepers* case para [13].

³² *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC) 341 paras [35]-[36], 340 para [F].

³³ *Promotion of Administrative Justice Act* 3 of 2000.

³⁴ *Scheepers* case para [14].

³⁵ *Scheepers* case para [15].

³⁶ *Scheepers* case para [16].

³⁷ *Scheepers* case para [17].

Instead of taking any of these steps, the applicants applied to the Court to have section 25(1) declared inconsistent with the provisions of sections 9,³⁸ 24,³⁹ 27⁴⁰ and 39⁴¹ of the Bill of Rights, read with section 195(1)(b)⁴² of the *Constitution*,⁴³ the respondents averring that the lack of water supply on the farm Denver "can be addressed by making use of the provisions of" the NWA.⁴⁴

The Court then pointed out further that the applicants had not availed themselves of the "mechanism" provided by section 40⁴⁵ of the NWA to "obtain a water licence for irrigation on the farm Denver", the applicants contending that this "would have been an exercise in futility".⁴⁶ The applicants, said the Court, "could have facilitated their application for a licence by requesting the fourth applicant to surrender its unused entitlements to the first and second applicants as envisaged in [s] 25(2)"⁴⁷ of the NWA.⁴⁸ The Court then noted that although parties can agree that one user's water entitlement "may be used by another farmer on another farm", section 25(2)(b) makes it clear that surrender by one person of an entitlement "for use of water from the same source in respect of other land" becomes effective only "if and when an application is granted" – and that a "mere agreement between the parties, as in this instance, does not suffice".⁴⁹ The Department, noted the Court further, had found the water use

³⁸ Which provides for equality before the law and equal protection and benefit of the law.

³⁹ Which is the clause which provides an environmental right.

⁴⁰ Which provides that "everyone has the right to have access to ... (b) sufficient food and water".

⁴¹ Which is the interpretative clause.

⁴² According to s 195(1)(b) of the NWA: (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ... (b) efficient, economic and effective use of resources must be performed. ...

⁴³ At this paragraph the Court indicated reliance by the applicant on a different set of constitutional provisions than those listed in para [1] – s 9 replacing s 25. In the end, however, nothing turned on this difference, which was probably typographical.

⁴⁴ *Scheepers* case para [18]-[19].

⁴⁵ Section 40 of the NWA provides that: "A person who is required or wishes to obtain a license to use water must apply to the relevant responsible authority for a license and follow the procedures as set out in [s] 41 of the [NWA]."

⁴⁶ *Scheepers* case paras [20]-[21].

⁴⁷ In terms of s 25(2) of the NWA: "A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement – (a) In order to facilitate a particular licence application under [s] 41 for the use of water from the same resource in respect of other land; and (b) on condition that the surrender only becomes effective if and when such application is granted.

⁴⁸ *Scheepers* case para [21].

⁴⁹ *Scheepers* case para [22].

on the farm Denver to be not an "existing lawful water entitlement", but had not prohibited the applicants from applying⁵⁰ for a water licence.⁵¹

According to the Court, its role in the instant case was to decide on the consistency (or otherwise) of section 25(1) of the NWA with the provisions of sections 9, 24, 27 and 39 of the Bill of Rights – this role requiring that the Court "enquire and decide as to the purpose and effect of" section 25(1). The Court then quoted a judgment of the Constitutional Court⁵² to the effect that both "[t]he purpose and effect of a statute are relevant in determining its constitutionality" and that a statute can be held invalid because of either of these being inconsistent with the *Constitution*; further, that a statute must be held invalid if it has a purpose that violates the *Constitution*; and, further, that the "effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional".⁵³ The Court then referred to the purpose of the NWA, which is to "ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled",⁵⁴ and listed factors which, amongst others, must be taken into account⁵⁵ in efforts to achieve this purpose.⁵⁶

The applicants, said the Court, contended that section 25(1) of the NWA was inconsistent with section 27 of the *Constitution*, as section 25(1) relates only to water for irrigation purposes while it should include the words "and industrial". If the Court were to declare section 25(1) unconstitutional it would, per the applicants, "make it possible to use water from an authorized water user, who has been licensed to use water for industrial purposes".⁵⁷ The Court's interpretation of section 25(1) was that it "allows a person who has already been authorized to use water for irrigation purposes to use the water at another place for irrigation purposes", provided that this can take place only after an application has been made to the Department and the application has been granted.⁵⁸

The Court found that the applicants had not appealed to the Water Tribunal, and that they had therefore not exhausted their internal remedies; nor had the first and second applicants applied for a water licence, with its being

⁵⁰ In terms of s 40 of the NWA.

⁵¹ *Scheepers* case para [23].

⁵² *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) (the *Zondi* case).

⁵³ *Zondi* case para [90]; *Scheepers* case para [25].

⁵⁴ Section 2(2) of the NWA.

⁵⁵ Sections 2(2)(a)-(k) of the NWA.

⁵⁶ *Scheepers* case para [26].

⁵⁷ *Scheepers* case para [27].

⁵⁸ *Scheepers* case para [28].

incumbent on them so to apply; and that the applicants had not appealed the original decision that the applicants had not been lawful water users before the promulgation of the NWA.⁵⁹ The Court then distinguished the instant case from that of *Makhanya v Goede Wellington Boerdery*⁶⁰ on the basis that that case had dealt with a reviewing and setting aside of a decision of the Water Tribunal, as opposed to a failure to approach the Water Tribunal.⁶¹

Finally, the Court concluded that it "cannot find that s 25(1) is inconsistent with the provisions of ss 9, 24, 27 and 39 of the Constitution in these circumstances" and dismissed the application with costs.⁶²

4 Comment on the judgment

The Court here was called upon to consider a constitutional challenge to the NWA in order to overturn an administrative decision made under the NWA. Judgment was given on the seemingly straightforward and uncontroversial basis that internal remedies had been found not to have been exhausted. Nevertheless, in the circumstances surrounding the judgment one must have a great deal of sympathy for the applicant and query whether justice was in fact fully served.

The NWA established a dispute resolution body – the Water Tribunal.⁶³ The Tribunal is an independent body with jurisdiction throughout South Africa and the power to conduct hearings anywhere within the country. The requirement for membership of the Tribunal is knowledge in law, engineering, water resource management or related fields of knowledge; and appeals to the Tribunal, appeals from its decisions, and mediation, are all provided for.⁶⁴ Particularly relevant for the case under discussion is that an appeal from a decision by a "responsible authority on a water licensing application" may be made to the Tribunal.⁶⁵

The Water Tribunal has not apparently been as successful as it might have been expected that it would be. Kidd, after analysing closely four decisions made by the Tribunal, concludes that "it is apparent that there is a general

⁵⁹ *Scheepers* case paras [29]-[30].

⁶⁰ *Makhanya v Goede Wellington Boerdery* 2013 1 All SA 526 (SCA) (the *Makhanya* case).

⁶¹ *Scheepers* case paras [31]-[32].

⁶² *Scheepers* case paras [33]-[34].

⁶³ NWA Chapter 15: Appeals and Dispute Resolution.

⁶⁴ Sections 146-150 of the NWA.

⁶⁵ Section 148(1)(f) of the NWA.

trend that the tribunal avoids dealing with the substantive merits of cases it faces and disposes of them as often as possible on legal technicalities".⁶⁶

In the *Makhanya* case an appeal was made to the High Court to overturn a decision of the Water Tribunal, which had upheld a decision made by the Department of Water Affairs and Forestry.⁶⁷ It appeared that the Water Tribunal had sat with only one member, who was not legally trained, and that he had decided that one of the factors which was to be considered outweighed all of the others. The High Court ruled that this factor had not so outweighed the others, ruled that the decision was palpably wrong, and ruled that, in the circumstances and relying on PAJA, the appropriate remedy was to substitute its own decision for that of the Tribunal instead of returning the matter to the Tribunal for reconsideration. This decision was confirmed by the SCA when both the member of the Water Tribunal and the Department appealed.⁶⁸

Judgment in the *Makhanya* case was delivered by the Supreme Court of Appeal only approximately one year before the litigation in the *Scheepers* case, and in the course of the judgment the SCA noted that:

... information [was] disclosed during the course of the appeal that the Water Tribunal no longer exists, with amendments to the Act being 'in the offing'; and thus that remittance to the Tribunal for a reconsideration of the application, as argued for by the second respondent,⁶⁹ would be impossible.⁷⁰

The SCA noted that it appeared from correspondence between the parties in the *Makhanya* case that if the second appellant's (ie the Department's) appeal were to be successful the matter would be referred to a mediation panel (as provided for in section 150 of the Act). The court characterised this suggestion as "astounding", as the mediation panel provided for "is not a body appropriate to consider the application for awarding of licences".⁷¹

In other words, in the *Makhanya* case the Department argued that a Decision of the Water Tribunal did not constitute reviewable administrative action, and that the Tribunal had been sitting in a judicial capacity and had made a decision that was not reviewable.⁷² In *Makhanya*, therefore, the

⁶⁶ Kidd 2012 SAJELP 50.

⁶⁷ For a full discussion of the *Makhanya* judgment, see Couzens and Bellengère 2012 SAJELP 137-153.

⁶⁸ Couzens and Bellengère 2012 SAJELP 137-153.

⁶⁹ The second respondent/appellant was the Department of Water and Environmental Affairs.

⁷⁰ *Makhanya* case para [46].

⁷¹ *Makhanya* case para [47]; Couzens and Bellengère 2012 SAJELP 145.

⁷² *Makhanya* case para [23]; Couzens and Bellengère 2012 SAJELP 142.

Department argued that the court was not entitled to review the Water Tribunal's decision as that body's action had not been administrative. The Tribunal, according to this argument, was acting in a judicial or quasi-judicial capacity and thus its decisions were subject to appeal but not review.⁷³ The Department sought to prevent a decision of the Water Tribunal from being set aside by a court on the basis that the decision of the Tribunal was not an administrative decision; whereas in *Scheepers* the Department argued the opposite – that a court was not entitled to set aside an administrative decision because not all administrative steps had been followed, recourse to the Tribunal being a necessary administrative step which could subsequently be reviewed by a court.

The irony in the *Scheepers* judgment is that the High Court did what Kidd criticises the Water Tribunal for having done⁷⁴ – avoiding the substantive merit of the case and disposing of the matter on a legal technicality. In this case the "technicality" relied on by the Court was a finding that a procedural step had been omitted in that the applicant had not exhausted all internal administrative remedies. While such exhaustion is an important principle, ensuring as it does that proper procedural avenues are followed for a myriad of practical reasons focused primarily on workloads, efficiency, the creation of precedent, and so forth,⁷⁵ it ought never to be allowed to trump the constitutional imperative of achieving justice. Reliance on the principle, however, especially a reliance in tenuous circumstances such as those that were before the court in the present case, smacks of a technical (not a substantive) approach to justice, an approach which regards procedure as being more important than the substantive rights at stake. It overlooks the fact that the High Court has an inherent right to review any administrative action and thus not to exercise this right for the reasons advanced in the present case arguably amounts to a technical sidestepping of judicial responsibility. Had the Court delved further into the matter, it might well have found that the remedy which it suggested (recourse to the Water Tribunal) would have been either impossible or prohibitively difficult for the applicant.

To explain further, the Court seems to have confused and, for convenience, conflated two separate and distinct causes of action. The application at

⁷³ Couzens and Bellengère 2012 *SAJELP* 148.

⁷⁴ Kidd 2012 *SAJELP* 50.

⁷⁵ In this regard, per the *Scheepers* case, "...internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanism, rectifying irregularities first before aggrieved parties resort to litigation". *Scheepers* case para [14] quoting directly from *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC) 341 paras [35]-[36].

issue was for the approval of an agreement temporarily to transfer water use rights, made in terms of section 25(1) in 2011. The cause of action was the third respondent's refusal thereof on the basis that the water was zoned "industrial" and not "agricultural". To argue, as the court did, that the applicant had not exhausted its right of appeal against its classification as a non-water user in terms of section 3 (a separate cause of action occurring several years previously) and that this precluded it from approaching a court for relief in the present case is problematic for two important reasons. Firstly, they are two completely separate and distinct issues and to say that an agreement to use water temporarily is contingent on a classification not expressly required by the Act is, on the one hand, tenuous; and, on the other, smacks of interpreting the legislation loosely, *contra personam* and not strictly as it should be when there is an alleged infringement of fundamental rights. Secondly, the effect of the judgment is to deny the Applicants recourse to court, which denial also strays into risky constitutional territory. Section 34 of the *Constitution* reinforces a strong judicial tradition, beginning at least with *Schierhout v Minister of Justice*,⁷⁶ that it is against public policy and thus unreasonable to deprive a party of the right to access to court. By adopting a technical (and technically flawed at that) procedural approach, holding that a failure to exhaust a possibly administrative avenue in respect of a separate issue on an earlier occasion, where this avenue led only to a non-functioning or perhaps even non-existent body, in order to find against the applicants does not develop our jurisprudence.

A variation on this argument can be made, which runs as follows. The Regional Head for the Department of Water Affairs (third respondent) dismissed the application as the water in question was zoned for industrial and not agricultural use. The internal remedy envisaged by the Court would therefore have been an appeal to the Water Tribunal against this ruling. However, the High Court dismissed the application which followed on this decision on the basis that the Act "does not provide for water being used for industrial purposes to be used for irrigation",⁷⁷ which was precisely why the applicant was mounting a constitutional challenge to the legislation in the first place. Furthermore, the Court found that the applicant was not a registered water user and "because it had chosen not to appeal this decision

⁷⁶ *Schierhout v Minister of Justice* 1925 AD 417.

⁷⁷ *Scheepers* case para [10].

to the Water Tribunal",⁷⁸ (a decade previously)⁷⁹ it had not exhausted all internal remedies available.⁸⁰ Relying on the failure to exhaust internal remedies when there are two different issues (causes of action) is technically and procedurally flawed. That they are unrelated causes of action/issues can be demonstrated by pointing out that even if the applicant *had* used its internal remedies successfully (ie, if it had been declared a water user) this would have had *no impact* on the third respondent's later decision to refuse the application. It was refused for other reasons (ie, because the water was zoned for industrial, not agricultural, use).

In addition, on its own chosen description of the purpose of internal remedies, the Court specifically refers to internal remedies as being designed to provide immediate relief. No immediate relief was necessary, or even reasonably anticipated as being necessary, at the time that the decision concerning the applicant's lack of water rights was made.

A further point which might be added is that, by coming up with its own reasons for refusing the application even though it upheld the third respondent's decision, the High Court, without admitting it, in part substituted its own decision for that of the third respondent. From the point of view of creating precedent this is confusing, as it becomes difficult for future litigants to know precisely which reason set the precedent. By stating that the first and second applicants should have applied for "a water licence in terms of section 40 of the Act"⁸¹ the Court has created the impression that not being a registered user is a barrier to temporary water use, although the third respondent appears not to have considered this a ground for refusing the request. Even had this been done, it would have had no impact on the third respondent's decision. It thus becomes difficult to regard this speculative finding as being of value as a precedent.

5 Comment on the circumstances

While it does not appear from the judgment that the factual situation of the Water Tribunal was raised either in pleadings or in argument, it is worth considering that body's history, which could have – and perhaps ought to have – been taken into account by the Court. This is especially so as the Court in *Scheepers* indicates specifically that it had considered the

⁷⁸ *Scheepers* case para [13].

⁷⁹ *Scheepers* case para [16]. The Court actually contemplates that the applicants should have appealed this decision "prior to the promulgation of the Act". The Act was promulgated in 1998.

⁸⁰ *Scheepers* case paras [13], [15], [16] and [30].

⁸¹ *Scheepers* case para [29].

judgment in *Makhanya*.⁸² In September 2012 it was reported that, after the Tribunal had "lost" its chairperson in November 2011, the body had been suspended since mid-2012⁸³ – a chairperson being a requirement for valid operation.⁸⁴ A representative of the Department⁸⁵ was quoted as saying that the Department had "not appointed a new chairman⁸⁶ because the Water and Environmental Affairs Minister⁸⁷ had decided "[that] the legislation governing the tribunal should be changed", that the Minister "wanted to change the law to give the tribunal greater powers and align the appointment process with that of other tribunals", and that the Tribunal "members' terms had been left to come to an end so that a new tribunal could be constituted under the new law".⁸⁸

According to the Department's⁸⁹ website,⁹⁰ accessed as recently as June 2016, the Tribunal is extant with five members,⁹¹ but the webpage is not dated and it is clear that it does not reflect the current position.⁹² Available on the same webpage is a list of all of the judgments made by the Tribunal, with those written judgments available for access⁹³ – however, the most recent judgment available is dated as having been given on 20 December 2011.⁹⁴ As the more recent judgments available on the website appear to

⁸² Couzens and Bellengère 2012 *SAJELP* 137-153.

⁸³ Blaine 2012 <http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman>.

⁸⁴ The Tribunal is to consist of "a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary" - NWA s 146(3). The Minister is not entitled simply to appoint the Tribunal's members, as the NWA requires that "the chairperson, the deputy chairperson and the additional members of the Tribunal [be] appointed by the Minister on the recommendation of the Judicial Service Commission contemplated in section 178 of the Constitution" - NWA s 146(5).

⁸⁵ Named as "Anil Singh, legal services director in the Department of Water Affairs". Blaine 2012 <http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman>.

⁸⁶ *Sic.* The NWA uses the term "chairperson" - s 146.

⁸⁷ Minister BEE Molewa.

⁸⁸ Blaine 2012 <http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman>.

⁸⁹ Now the Department of Water and Sanitation – the website has been updated to reflect this change. The Minister for Water Affairs and Sanitation, appointed on 25 May 2014, is Minister NP Mokonyane.

⁹⁰ DWS date unknown <https://www.dwaf.gov.za/WaterTribunal/Default.aspx>.

⁹¹ Per the NWA, the Tribunal is to have "a chairperson, a deputy chairperson and as many additional members as the Minister considers necessary" - NWA s 146(3). See DWS date unknown <https://www.dwaf.gov.za/WaterTribunal/About.aspx>.

⁹² Repeated telephone calls to the Tribunal made by the present authors in March 2016 went unanswered; and nor could the matter be clarified through e-mail contact.

⁹³ DWS date unknown <https://www.dwaf.gov.za/WaterTribunal/Cases.aspx>.

⁹⁴ *Federation for Sustainable Development v The Department of Water Affairs (Water Tribunal)* (unreported) case number WT 08/03/2011, appeal ruling of 20 December 2011.

have been made exclusively by the same members of the Tribunal as are currently listed, and much has happened since,⁹⁵ the webpage is clearly inaccurate.

This position is further supported by words attributed to a different spokesperson for the Department quoted in the media,⁹⁶ to the effect that as at January 2014 the Minister and the Department were "still considering nominations, made by the Judicial Services Commission, for the tribunal's chairperson", that "also under consideration [were] nominations to the Water Research Commission, for additional members, who have to be professionals such as engineers, water resource experts or technicians", and that "[t]he previous Water Tribunal's term of office came to an end in August last year and could not be extended as they had already served one full term and a further year extension".⁹⁷

As in the *Makhanya* judgment, in the matter of *Escarpment Environment Protection Group v Department of Water Affairs*,⁹⁸ a judgment of Tuchten J in the North Gauteng High Court, it was indicated by the Court that it had been advised "by counsel" that "the Water Tribunal is not presently functional; its members all apparently having resigned".⁹⁹ As in the *Makhanya* judgment, too, the Court gave no further information and did not discuss any further implications of this.

The *Escarpment* judgment is important to consider in the present discussion. The matter concerned appeals lodged in 2011 to the High Court from appeals which were lodged in 2009 to, and in respect of which judgments were given in 2011 by, the Water Tribunal.¹⁰⁰ It is not necessary

⁹⁵ Including the dissolution of the Tribunal.

⁹⁶ One Mr Maya Scott, quoted in Tancott 2014 <http://www.infrastructurene.ws/2014/01/07/lobby-groups-water-challenges-fall-on-deaf-ears>.

⁹⁷ Tancott 2014 <http://www.infrastructurene.ws/2014/01/07/lobby-groups-water-challenges-fall-on-deaf-ears>. See the discussion later in this Note of recent appointments.

⁹⁸ *Escarpment Environment Protection Group and Wonderfontein Community Association v Department of Water Affairs and Xstrata Alloys (Pty) Ltd and The Water Tribunal* (North Gauteng High Court) (unreported) case number A665/11; 4535/11 of 20 November 2013 (the *Escarpment* case).

⁹⁹ *Escarpment case* para [5]. The Water Tribunal was cited as the third respondent, but did not oppose the appeal.

¹⁰⁰ DWS date unknown <https://www.dwaf.gov.za/WaterTribunal/Cases.aspx>. The appeal judgment and the three original matters can be accessed on the Water Tribunal's "Case Decisions" webpage – see *Escarpment Environment Protection Group and Wonderfontein Community Association v Department of Water Affairs and Exxaro Coal* (Water Tribunal) (unreported) case number WT03/06/2010, appeal ruling of 21 July 2011; *Escarpment Environment Protection Group and Langkloof Environmental Committee v Department of Water Affairs and Werm Mining (Pty) Ltd* (Water Tribunal)

here to discuss the *Escarpment* judgment in detail, but what is important to note is that a salient issue on appeal concerned whether the Tribunal had been correct in finding that the appellants, which were non-governmental organisations,¹⁰¹ had not had the requisite *locus standi* to appeal to the Tribunal.¹⁰² The Court eventually ruled on this that it could find "[n]o rational purpose ... for denying the Water Tribunal the input of the classes of objectors I have identified";¹⁰³ and that the "policy" which it could identify in the legislative context was

... a desire, within broad limits, to provide for appeals to the Water Tribunal by persons interested in or affected by decisions made by functionaries in the exercise of the powers conferred upon them by the NWA.¹⁰⁴

The Court eventually held, considering "the nature of the case and its importance within the context of the interests of justice" and that "[i]t concerns access to justice",¹⁰⁵ that the Water Tribunal's decision to deny standing should be substituted with the order that: "[i]t is declared that the appellants have standing to pursue their appeal before the Water Tribunal".¹⁰⁶

Comment on this decision in the media included the observation of Tancott that Tuchten J had ruled "that civil society groups that object to water licences granted by the department will not have to go to the expense of taking the department and the licence holders to court" as "[i]nstead they can appeal to the Water Tribunal, the statutory body that has jurisdiction over water disputes in South Africa" which "is a far cheaper, simpler option".¹⁰⁷ What is important to understand, though, is that Tuchten J's ruling was *not* that civil society groups *must* appeal to the Water Tribunal before appealing to the High Court, but that they *can* follow this course. Had approaching the Water Tribunal been a requirement, then the *Escarpment* case would have turned only on the issue of condonation for late filing and not on the issue of *locus standi*. Pretorius J in the *Scheepers* case does not

(unreported) case number WT 25/11/2009, appeal ruling of 21 July 2011 and condonation ruling 4 June 2010; *Escarpment Environment Protection Group and Langkloof Environmental Committee v Department of Water Affairs and Xstrata South Africa (Pty) Ltd* (Water Tribunal) (unreported) case number WT 2411/2009, appeal ruling of 22 July 2011.

¹⁰¹ *Escarpment* case para [61].

¹⁰² *Escarpment* case para [12].

¹⁰³ *Escarpment* case para [49].

¹⁰⁴ *Escarpment* case para [57].

¹⁰⁵ *Escarpment* case para [65].

¹⁰⁶ *Escarpment* case para [71.3].

¹⁰⁷ Tancott 2014 <http://www.infrastructurene.ws/2014/01/07/lobby-groups-water-challenges-fall-on-deaf-ears>.

appear to have considered this aspect in ruling that litigants who had not appealed to the Water Tribunal before approaching the High Court had not exhausted their internal remedies.¹⁰⁸

The Court in *Scheepers* also ignored some characterization of the Water Tribunal. Thompson,¹⁰⁹ for instance, has suggested that the Tribunal is "not a tribunal for the purpose of the Promotion of Administrative Justice Act" (PAJA)¹¹⁰ and that the Tribunal should therefore "not judicially review administrative actions when hearing appeals and applications".¹¹¹ Thompson's argument is that there is no indication in the NWA that the Tribunal has any review authority and that it "should therefore only consider a case on its merits" – if a person, per Thompson, "feels that an administrative action is not procedurally fair, the person should institute proceedings in a court or tribunal as contemplated in the PAJA for the appropriate relief and not the Water Tribunal".¹¹² This interpretation does not conflict with the decision in *Makhanya* that the decision of the Water Tribunal was reviewable by the High Court. In *Makhanya* what was in issue was an interpretation of a legal point by the Water Tribunal, and whether this interpretation/decision could be set aside; in *Scheepers* what was at issue was the question of whether the applicant had had the right to approach the High Court with a constitutional argument before having had that argument considered by the Water Tribunal.

To be fair, what probably did not assist the Court is that the applicants in *Scheepers* framed their arguments in terms of a request for a declaration of unconstitutionality within the NWA in order to circumvent the problem they faced of that Act differentiating between industrial and irrigation use. This must have confused issues. However, the Court did not in the end consider whether these arguments were valid or not, preferring instead to dismiss the matter on the procedural ground that internal remedies were not exhausted.

¹⁰⁸ Whether Pretorius J in the *Scheepers* case should have considered the ruling of Tuchten J in the *Escarpment* case binding, or at least heavily influential, will not be considered here. Pretorius J did not refer to Tuchten J's ruling.

¹⁰⁹ It is interesting to note that Hubert Thompson, a registered engineer and admitted advocate, is listed as one of the current additional members of the Water Tribunal. DWS date unknown <https://www.dwaf.gov.za/WaterTribunal/About.aspx>.

¹¹⁰ *Promotion of Administrative Justice Act* 3 of 2000.

¹¹¹ Thompson *Water Law* 612. The NWA provides that appeals from the Water Tribunal on questions of law lie to a High Court, s 149(1)(a); and that such appeals must be prosecuted as though they were appeals from a Magistrate's Court to a High Court, s 149(4).

¹¹² *Thompson Water Law* 612-613.

For that, the present authors believe that the judgment can, and should, be criticised.

In early June 2014 the *National Water Amendment Act of 2014*¹¹³ was promulgated – the amendments then took effect from 1 September 2014.¹¹⁴ One of the objects of the amending Act was "to amend the authority of the Water Tribunal as appeal authority relating to prospecting, exploration, mining or production activities".¹¹⁵ Per the official notes to the Bill,¹¹⁶ section 148 "has been amended to establish an appeal process for certain decisions, relating to water use licences in the mining sector, to be dealt with by the Minister of Water and Environmental Affairs, rather than to the Water Tribunal".¹¹⁷ This appears to have given rise to somewhat alarmist media reaction, including the headline "SA Water Amendment Bill scraps water law tribunal".¹¹⁸ This was not in fact the case, as could be discerned from the content of the article, as the Amendment Act changed the position only in respect of mining-related licence appeals. It is tempting to speculate that the change was made, and brought into effect so quickly, because the mining industry was not willing to wait until a firm decision on the status of the Water Tribunal had been made – and the mining industry as a whole has far more influence than do individual applicants for water licences in non-mining-related fields.

In late June 2014 the Minister of Water and Environmental Affairs¹¹⁹ published a Notice in the *Gazette*¹²⁰ inviting nominations for appointments to the Water Tribunal. No results of the nominations process were announced, however; nor in the writing of this article could these be traced through the Judicial Services Commission itself.

In May 2015 the confusion and uncertainty over the Water Tribunal reached Parliament, with a Member of Parliament for the opposition Democratic

¹¹³ *National Water Amendment Act 27 of 2014*.

¹¹⁴ NWA, as amended by Act 27 of 2014.

¹¹⁵ Long Title, *National Water Amendment Bill 3 of 2014*.

¹¹⁶ Clause 4: "Memorandum on the Objects of the National Water Amendment Bill (as Introduced by Portfolio Committee on Water and Environmental Affairs)", *National Water Amendment Bill 3 of 2014*.

¹¹⁷ Clause 4 of the Bill notes further that "[t]he process will be elaborated on in regulations mandated by section 26(1) (k) of the National Water Act".

¹¹⁸ Furter 2014 <http://sheqafrica.com/water-law/>.

¹¹⁹ Curiously, not the Minister for Water Affairs and Sanitation, despite this new Minister's having already been appointed. It appears, in fact, that the Minister for Water and Environmental Affairs made a total of three calls for nominations to the Water Tribunal (Gen N 615 in GG 36568 of 14 June 2013; Gen N 143 in GG 37402 of 28 February 2014; Gen N 456 in GG 37766 of 24 June 2014).

¹²⁰ Gen N 456 in GG 37766 of 24 June 2014.

Alliance¹²¹ asking the Minister, firstly, whether she had "taken any steps to re-constitute the Water Tribunal" and, if not, why not, and if so, what the relevant details were; secondly, whether the Minister had "requested recommendations for the membership of the Water Tribunal from the Judicial Service Commission (JSC) and the Water Research Commission (WRC)", and if not, why not, and "if so, which individuals were nominated for membership of the Water Tribunal".¹²²

The Minister replied to the first question that the Department had¹²³ "invited nominations for the position of the Chairperson of the Water Tribunal", had placed advertisements in "a number of national newspapers", and that "on 9 October 2014, the Judicial Services Commission (JSC) [had] interviewed six shortlisted candidates" after which interviews the JSC had "recommended four candidates from which to select and appoint the Chairperson of the Water Tribunal".¹²⁴

On 19 March 2015 a "Statement on Cabinet Meeting of 18 March" was published by the Department of Government Communication and Information System.¹²⁵ This indicated merely that, "subject to the verification of qualifications and the relevant clearance", six persons had been appointed to the Water Tribunal.¹²⁶ In late June 2015 it was reported in the media that "Water Minister Nomvula Mokonyane" had "averted a court battle scheduled [] to force her to appoint members of the Water Tribunal by informing the applicants that she made the appointments they were demanding".¹²⁷

In July 2015 questions were raised again by the same Member of Parliament as before,¹²⁸ who asked the Minister, firstly, whether "with

¹²¹ Mr LJ Basson.

¹²² PMG 2015 https://pmg.org.za/question_reply/543/.

¹²³ By Gen N 456 in GG 37766 of 24 June 2014 in terms of s 146 of the Act read with item 3 of schedule 6 of the NWA.

¹²⁴ PMG 2015 https://pmg.org.za/question_reply/543/.

¹²⁵ Department of Communications 2015 <http://www.gov.za/node/735672>: "Appointments: Water Tribunal".

¹²⁶ The six being Adv TAN Makhubele (Chairperson); Ms L Mbanjwa (Deputy Chairperson); Mr PMM Jonas; Ms MM Nkomo; Prof. T Murombo; and Mr F Zondagh.

¹²⁷ Tempelhoff 2015 <http://www.netwerk24.com/Nuus/Omgewing/Watertribunaal-inderhaas-aangestel-20150624>. According to the report, the "Escarpment Environmental Protection Group and the Wonderfontein Community Association" had taken "Mokonyane to court for her failure to appoint the members for almost three years", but "Mokonyane's legal team then informed the organisations that six appointments had been made".

¹²⁸ Mr LJ Basson.

reference to her reply¹²⁹ [] on 26 May 2015, has the Water Tribunal started with their work [and] if not, why not, [and] if so, how many cases have been resolved"; and, secondly, "how many cases are outstanding (a) that the previous tribunal did not deal with and (b) in total as at the latest specified date for which information is available?"¹³⁰ The Minister responded that the "Water Tribunal ha[d] started with their work"; that there "are no finalized cases" – "[h]owever, the Water Tribunal had its first hearing on the 22 July 2015 to 24 July 2015 and the cases were not finalised and were postponed to 27 August 2015 to 28 August 2015".¹³¹ The Minister then advised that "[a]s at August 2012 when the Water Tribunal term of office came to an end a total of 124 cases were outstanding"; and that "[t]he Department currently has a total of 313 outstanding cases".¹³²

On 5 August 2015 the Department held a Departmental Briefing as a "Progress Report on water licences and their implications for economic development in South Africa".¹³³ At this briefing it was advised by the "Deputy Director General",¹³⁴ that "[w]ith regard to the appeal process, [the] Water Tribunal would deal with all appeals in all the other sectors as well, and not just the water ones"; that "[t]he internal appeal authority was the Department of Environmental Affairs, which would be instituted once the regulations were finalized"; that the Tribunal was, "however, already authorised and working"; and that "[i]n future, they would talk about policy, and one of the suggestions was to simplify the policies".¹³⁵

6 Conclusion

With understatement, Kidd describes the implementation of the NWA as being "not an easy task", explaining the "granting of water licences, in particular" as being particularly complex since it involves "the balancing of several (at least eleven) factors that range from the scientific to the social, together with economic factors".¹³⁶ "Given the importance of water in South Africa and its scarcity", he adds, "licensing decisions ought to be taken competently, consistently with the purposes of the [NWA], and in a manner

¹²⁹ PMG 2015 https://pmg.org.za/question_reply/543/.

¹³⁰ PMG 2015 <https://pmg.org.za/committee-question/718/>.

¹³¹ PMG 2015 <https://pmg.org.za/committee-question/718/>.

¹³² PMG 2015 <https://pmg.org.za/committee-question/718/>.

¹³³ PMG 2015 <https://pmg.org.za/committee-meeting/2124/>.

¹³⁴ Mr Anil Singh, see Blaine 2012 <http://www.bdlive.co.za/national/2012/09/13/water-tribunal-suspended-after-losing-chairman>.

¹³⁵ PMG 2015 <https://pmg.org.za/committee-meeting/2124/>.

¹³⁶ Kidd 2012 *SAJELP* 50.

that respects the rights (not only rights to water but also administrative justice and other rights) of applicants and interested other parties".¹³⁷

In the *Escarpment* case, the Court approved of a dictum in the *Koyabe* Case that:

[i]nternal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize 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.¹³⁸

The Court in *Escarpment* then indicated that the Court in *Koyabe* had quoted Hoexter, with approval, as suggesting that:

[e]ffective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a "calmer, more objective and reflective judgment" in reconsidering the issue.¹³⁹

As has been explained,¹⁴⁰ it appears to the present writers that the Gauteng High Court in the *Scheepers* case erred in finding that there had been a legal duty on the applicants to have exhausted all possible internal remedies before making their application to that Court. The Court ought at the very least to have explained why it was departing from the approach taken by the North Gauteng High Court in the *Escarpment* case. Further, the judgment in the *Scheepers* case was one which displayed a considerably lack of sensitivity toward the applicants. In the light of Kidd's comment, the dictum from *Koyabe*, and the quote from Hoexter approved of in *Koyabe*, it appears to the present writers that against the backdrop of the considerable confusion that reigned in the field of water law in South Africa at the time of the circumstances which gave rise to the application in *Scheepers*, and which circumstances meant that the remedy which the Court believed the applicants ought to have sought to obtain may well have been an empty one, the Court did a disservice both to the applicants and to the jurisprudence of water rights in South Africa.

¹³⁷ Kidd 2012 SAJELP 50.

¹³⁸ *Escarpment* case para [50], citing *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC) para [35].

¹³⁹ *Escarpment* case para [51], citing *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC) para [35]. The reference being to Hoexter *Administrative Law* 63.

¹⁴⁰ See part 4 of this article above.

In South Africa's straightened water circumstances, and against the backdrop of the competing imperatives of poverty alleviation, rapid development, and racial redress, for many decades to come we will be dealing with a difficult balancing act when it comes to water use licence allocations. For decades to come, also, we will continue to have desperate unsuccessful applicants for water use seeking redress in numerous fora. It is imperative that we develop, as fast as we can, a settled and efficiently functioning governance structure, and a concomitant relatively settled jurisprudence.

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List of Abbreviations

Department, The DWA / DWS	Department of Water Affairs, Gauteng Department of Water Affairs / Department of Water and Sanitation
NWA	National Water Act 36 of 1998
PAJA	Promotion of Administrative Justice Act 3 of 2000
PMG	Parliamentary Monitoring Group

SAJELP	South African Journal of Environmental Law and Policy
SAPR/PL	SA Publik Reg / Public Law
SCA	Supreme Court of Appeal
UNDESA	United Nations Department of Economic and Social Affairs