

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : EAST LONDON

CASE NO. 1040/2018

In the matter between:

MINISTER OF WATER AND SANITATION Plaintiff

and

AMATHOLE DISTRICT MUNICIPALITY Defendant

JUDGMENT

GRIFFITHS, J.:

[1] This is an opposed exception to a special plea and plea. The plaintiff issued summons against the defendant for the following relief:

“(a) The defendant’s failure to pay water use charges under the NWA (National Water Act)¹ and water research levies under the WRA (Water Research Act) pleaded herein²:

(i) threatens everyone’s right to water guaranteed in section 27(1) of the Constitution³; and

(ii) is declared inconsistent with sections 1(a), (b), (c), 2, 7(2), 152, 195 and 237 of the Constitution of the Republic of South Africa 1996;

(b) The defendant be ordered to regularly report, under oath, to the Honourable Court on how it has complied with its constitutional obligations;

(c) The defendant is ordered to forthwith pay:

(i) the water use charges set out in (specified annexures attached to the plaintiff’s particulars of claim) in the amount of R 44 743 259, 46;

(ii) water research levies set out in (specified annexures) in the amount of R 1 828 026, 23; or

(iii) such other amount which the Honourable Court deems to be just and equitable

into the Water Trading Account of the Water Trading Entity;

¹ Act 36 of 1998

² Act 34 of 1971

³ Act 108 of 1996

- (d) In the event that the defendant disputes the quantum of its liability in respect of (these charges and levies), a Special Master is appointed to determine the quantum thereof;
- (e) That the special Master is granted the same powers as that of a referee in terms of section 38 of the Superior Courts Act⁴;
- (f) Mora interest from the date of demand to the date of payment;
- (g) The defendant pays the costs of the plaintiff on an attorney and client scale, including the costs consequent upon the employment of four counsel, which costs will include the costs of senior counsel.”

[2] The defendant excepted to the plaintiff’s particulars of claim on various bases including a ground that the pleadings were vague and embarrassing as it was unclear whether the plaintiff relied on statutory causes of action or on a constitutional cause of action. The exception was heard by Stretch J who, in a fully reasoned judgment, dismissed it with costs.

[3] Consequent upon this the defendant raised a special plea of prescription and pleaded over on the merits. To both the special plea, and various portions of the plea, the plaintiff has excepted. It is this exception which now falls for decision.

⁴ Act 10 of 2013

[4] Because of their importance in reaching a decision in this regard, it is necessary to reproduce both the special plea and notice of exception in full. The special plea reads as follows:

“The Defendant raises the following Special Plea to the Plaintiff’s Particulars of Claim:

1. The Plaintiff has pleaded, in paragraph 31 of the Particulars of Claim, that the tariffs for water charges for the water management area between the Mzimvubu River to the Keiskamma River, and between the Fish River to the Tsitsikama River, for the years 2003 to 2018, have been determined by various Acts and pricing strategies promulgated from, time to time.
2. The Plaintiff has further pleaded that the Defendant is liable for water use charges, excluding interest, for the period 2003 to 2018, and has itemized the cost of both water usage and water research levies for the stated period.
3. The Plaintiff has further specifically pleaded, in paragraph 13 of the Particulars of Claim that the water use charges, totalling approximately R44 000 000.00 do not constitute the imposition of a tax, levy or duty, and the Plaintiff further contends that water research levies due constitute the imposition of a levy in terms of Section 11(1) (b) of the Water Research Act 34 of 1971.
4. The Defendant pleads that the water use charges constitute a debt, being a liquidated amount allegedly due and owing and payable by the Defendant to the Plaintiff for the years 2003 to 2018 inclusive.

5. In terms of Section 12 of the Prescription Act 68 of 1969, prescription shall commence to run as soon as the debt is due, and terms of Section 11 (d) of the Prescription Act, such debts shall prescribe after the passage of three years.
6. When Summons was served on the Defendant on the 5th of September 2018, the Defendant pleads that all water use charges, which arose as debts on or before the 4th of September 2015, had prescribed.

WHEREFORE the Defendant prays that the Plaintiff's claims for water use charges incurred before the 5th of September 2015 be dismissed with costs."

[5] The plaintiff's exception reads as follows:

"KINDLY TAKE NOTICE FURTHER THAT the grounds upon which the Plaintiff relies upon are set out hereunder:

First Ground

1. At paragraphs 4 to 6 and its special plea prayer, the Defendant raises a special plea of prescription.
2. In particular, at paragraph 4 of the plea, the Defendant contends that its liability to pay water use charges for the period 2003 to 2018 constitutes a debt as contemplated in section 12 of the Prescription Act 68 of 1969 (*"the Prescription Act"*).

3. Accordingly, the Defendant pleads that its liability to pay water use charges for the 2003 to 2015 water use periods have prescribed.
4. The Plaintiff pleads that the Minister is the public trustee and custodian of the country's water resources.
5. In terms of section 59(2) of the National Water Act 36 of 1998 (*"the NWA"*) the Defendant must pay all water use charges imposed under section 57 of the NWA read with the pricing strategies promulgated, from time to time, in terms of section 56 of the NWA.
6. The obligation to pay the aforesaid water use charges is peremptory by virtue of the fact that the Defendant has registered its water use as contemplated by 26 of the NWA.
7. Paragraph 29 of the Plaintiff's particulars of claim is repeated.
8. The Plaintiff pleads that:
 - 8.1 she is competent to raise and collect water use charges imposed on the Defendant;
 - 8.2 the water use charges imposed on the Defendant does not constitute the imposition of a tax, levy or duty in terms by section 57(5) of the NWA; and
 - 8.3 the water use charges do not constitute a debt as contemplated by the Prescription Act but an obligation arising out of the Constitution, 108 of 1996 (*"the Constitution"*) and the NWA.

9. The water use charges and water research levies are applied to give effect to the progressive realization of the right to access to water in section 27(1) of the Constitution.
10. The Defendant's non-performance of and non-compliance with constitutional obligations is not a debt as contemplated by the Prescription Act.
11. In the absence of the prescription, the Defendant has no defence to its liability to comply with its constitutional obligation which include the payment of the water use charges.
12. In the result, the special plea lacks averments to sustain a defence and is excipiable.

Second Ground

13. At paragraphs 30.1, 30.2 and 32 of its plea, the Defendant disputes its liability to pay water use charges for the period beginning 2003 to 2018.
14. At paragraph 30.2, the Defendant refers to the prescription special plea wherein the liability is disputed on the basis of prescription in respect of the water use charges levied from 2003 to 4 September 2015.
15. On the Defendant's version the water use charges in respect of 5 September 2015 to 2018 water use period have not prescribed.
16. However, even if it is assumed that the Prescription Act applies (which is denied), then in that event the Plaintiff pleads that the

Defendant has not pleaded the necessary allegations which constitute and/or sustain a defence.

17. In the circumstances, the plea is excipiable for lack of averments necessary to sustain a defence.

Third Ground

18. At paragraphs 33.1 to 33.5 of its plea, the Defendant poses a rhetorical question relating to the applicability of the Prescription Act. At the same, the Defendant refers to its special plea of prescription.
19. This is a purported plea to the positive assertion by the Plaintiff that the water use charges do not constitute a debt contemplated by the Prescription Act.
20. The Defendant makes a bare denial. It does not set out the basis of its denial that the water use charges do not constitute a debt in terms of the Prescription Act. In any event, non-performance with constitutional obligations in the form of non-payment of the water use charges is not subject to the Prescription Act.
21. The special plea only deals with the time and does not deal with the basis why the water use charges constitute a debt contemplated in section 12 of the Prescription Act.
22. Moreover and as stated above, prescription as a defence is not available to the Defendant in terms of section 57(5) of the NWA and given that the liability is constitutionally based.
23. In the circumstances, the plea is excipiable for lack of averments necessary to sustain a defence.

24. At paragraph 34 of its plea, the Defendant denies that water research levies were levied against it and therefore disputes the liability thereof.
25. The said paragraph constitutes a bare denial in circumstances where the Defendant is required to set out the reason for disputing that the water research levies were levied against it.
26. This is compounded by the Defendant's failure to plead to the allegation that the Plaintiff had an obligation to collect the water research levies.
27. In the circumstances, the plea is excipiable for lack of averments necessary to sustain a defence in respect of the levying and the liability to pay the water research levies.

Fifth Ground

28. In pleading to the Plaintiff's allegations that the pleaded water research levies were recoverable from the Defendant, the Defendant at paragraphs 36 and 41 of its plea does not state its defence. Rather, the Defendant makes a bare and evasive denial.
29. The Defendant is required to set out the basis for disputing its liability. Further, the Defendant does not in its plea make allegations with such particularity to disclose a defence *alternatively* enable the Plaintiff to assess the case it must meet.
30. In the circumstances, the plea is excipiable for lack of averments necessary to sustain a defence in respect of the levying and the Defendant's liability to pay the water research levies.

Sixth Ground

31. At paragraph 45.1 of its plea, the Defendant evasively denies that it has failed to pay or refused to pay water charges or water research levies. It then refers to “*what is set out above*”. Accordingly, the Defendant appears to deny that it has threatened everyone’s right to access to water.
32. However, and as set out above, the Defendant has not set out the basis of its defence(s).
33. Accordingly, the Defendant’s plea does not contain allegations which sustain a defence in respect of threatening everyone’s right to access to water.
34. In the circumstances, the plea is excipiable for lack of averments necessary to sustain a defence in respect of the infringement of the right to access to water.

WHEREFORE the Plaintiff prays for an order that:

1. the exception is upheld.
2. the Defendant’s plea be set aside and defence dismissed.
3. in the event that the Defendant is granted leave to amend the plea, if the Defendant fails to amend within 10 days of the Court’s Order, then the Defendant’s defence is dismissed.
4. costs of suit.
5. further and/or alternative relief.”

[6] The plaintiff has clearly stated, both in her particulars of claim and in argument before me, that her cause of action is based on the Constitution and

that she does not rely on a statutory cause of action. In this regard, of the plaintiff pleaded as follows at paragraph 20 of her particulars of claim:

“The Minister pleads that:

20.1 this matter does not relate to the exercise of a statutory power or function but is aimed at vindicating the Constitution and seeking a just and equitable remedy against the defendant’s breaches of its constitutional obligations as pleaded herein;

20.2 the issues to be determined in this matter are constitutional matters which are only justiciable by a court of law under section 172(1) of the Constitution which is the final arbiter of constitutional matters and not the persons or entities referred to in IRFA.”

[7] And again at paragraphs 55 and 56:

“55. The Minister pleads that the facts of this case warrant an order which is just and equitable in terms of section 172 (1) (b) of the Constitution.

56. The Minister pleads that a just and equitable order, in the circumstances of this matter, would be:

56.1 an order directing the defendant to forthwith comply with its constitutional obligations pleaded herein;

56.2 a structural interdict requiring the defendant to regularly report to the Honourable Court on how it has complied with its aforesaid constitutional obligations; and

56.3 that the defendant forthwith pay the outstanding water use charges and water research levies pleaded herein.”

[9] In dealing with the defendant’s alleged failure to carry out its constitutional obligations, the plaintiff has, *in extenso*, set out the provisions of the NWA and the WSA and has alleged that the defendant has, for many years, failed to pay the water use charges as levied in terms of these Acts. These actions or failures, for various reasons alleged in the particulars of claim, amount to a violation of its constitutional duties by the defendant. Accordingly, the plaintiff has argued that, as it seeks redress in terms of the Constitution and, in particular, in terms of section 172 (1) thereof, no direct reliance is placed on the subsidiary statutes for its claim. *A fortiori*, so it is argued, the Prescription Act cannot be raised against it as such duties are not obligations for the purposes of extinctive prescription and/or are not “debts” for the purposes of that Act. As regards the further grounds of exception, the plaintiff has argued that these effectively amount to a bald denial and that the defendant has not placed a proper defence before the court.

[9] The defendant’s argument in response is that:

1. the plaintiff’s cause of action, when shorn of “extra verbiage”, boils down to nothing more than a claim to recover a debt;

2. however one may try to present it, the right of a creditor to claim that a debtor is liable to pay charges amounts to nothing more than a claim by a creditor as against the debtor for the payment of a debt;
3. the water use charges and levies as set out in the particulars of claim are both debts for the purposes of the Prescription Act. Accordingly, such debts prescribe within a period of 3 years from the time when the debt becomes due in accordance with sections 12(1) and 11(a) of that Act;
4. even if it is so that the plaintiff has indeed claimed an enforcement of the defendant's constitutional obligations, these, likewise, are governed by the Prescription Act and will prescribe after a period of 3 years;
5. therefore, the special plea is good in law and cannot be challenged on exception;
6. as regards the further grounds of exception, the relevant paragraphs of the plea amount to a denial that the plaintiff has indeed raised the water use charges and/or levies as pleaded in the particulars of claim and/or a denial that the plaintiff has indeed at any stage before issue of summons claimed such from the defendant. Accordingly, it cannot lie in the mouth of the plaintiff to except to these parts of the defence as she has been put to the proof of her claim in this regard.

[10] As regards the main issue between the parties it seems to me that there are two questions which this court is required to determine. These are: firstly, does the plaintiff's cause of action amount to an enforcement of the defendant's constitutional obligations or is it simply based on a statutorily enforceable series

of debts owed by the defendant to the plaintiff, and, secondly, if it is indeed a constitutional claim, have the defendant's obligations in terms of the Constitution prescribed pursuant to the provisions of the Prescription Act?

[11] The first issue has, in my view, been laid to rest by the judgment of Stretch J in this matter in dealing with the defendant's exception to the plaintiff's particulars of claim. That exception, and her judgment, dealt in the main with the principle of subsidiarity, it having been contended by the defendant, firstly, that the plaintiff's claim alleged that the NWA and the WSA contained statutory claims for charges and levies and were enacted to give effect to the constitutional right of access to water and, secondly, because the amounts sued for were levied in terms of those two pieces of legislation, water users are obliged to pay those amounts in terms thereof. It was accordingly submitted that the plaintiff was obliged to pursue her claims in terms of those subordinate pieces of legislation and could not rely on the Constitution. Stretch J proceeded to deal with this as follows⁵:

“

8. I now return to the defendant's argument regarding the application of the principle of subsidiarity. It is contended on the defendant's behalf that both the Water Act and the Research Act provide statutory remedies for the recovery of levies and charges. In terms of the principle of constitutional subsidiarity, so the argument goes, the plaintiff is required to make use of these remedies in order to pursue her rights. She is not permitted to rely directly on the Constitution without challenging the aforesaid legislation as falling short of the constitutional standard. The defendant argues that the plaintiff has not pleaded such a challenge and is accordingly barred from relying on a constitutional cause of action. In this respect the defendant appears to rely, inter alia, on the following extract from *My Vote Counts NPC v Speaker of the National Assembly and Others*⁶ where Cameron J says the following:

‘[52] But it does not follow that resort to constitutional rights and values may be freewheeling and haphazard. The Constitution is primary, but its influence

⁵ Because Stretch J was dealing with the same matter as this court at an earlier stage thereof, her judgment in this regard has been quoted in full, including the footnotes.

⁶ 2016 (1) SA 132 CC

is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first.

[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

[54] Over the past 10 years this court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted. In *Mazibuko*⁷ the right to have access to sufficient water guaranteed by s 27(1)(b) was in issue.⁸ The applicant sought a declaration that a local authority's water policy was unreasonable. But it did so without challenging a regulation, issued in terms of the Water Services Act, that specified a minimum standard for basic water supply services. This, the court said, raised "the difficult question of the principle of constitutional subsidiarity". O'Regan J, on behalf of the court, pointed out that the court had repeatedly held "that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution".

The litigant could not invoke the constitutional entitlement to access to water without attacking the regulation and, if necessary, the statute.⁹

9. In the premises the defendant contends that the plaintiff's constitutional claim for payment is hit by the principle of subsidiarity, firstly because the claim alleges that the two pieces of legislation containing statutory claims for charges and levies were enacted to give effect to the constitutional right of access to water, and secondly, because the amounts sued for were levied in terms of the Water Act and

⁷ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

⁸ Section 27 of the Bill of Rights provides:

'(1) Everyone has the right to have access to –

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.'

⁹ In the footnote however Cameron J comments that *Mazibuko* is very different from *My Vote Counts*. Firstly, because in *Mazibuko* there was no challenge to the validity of existing legislation, and secondly, *Mazibuko* invoked no express obligation on a specific organ of state (viz Parliament), to enact national legislation. Cameron J goes on to say that s 27(1)(b) of the Bill of Rights did not contain an obligation of that sort.

the Research Act, and that water users are obliged to pay those amounts in terms of these two pieces of legislation. Differently put, they are statutory claims for amounts contemplated in the legislation, which have concomitant statutory causes of action. Thus it is unnecessary for the plaintiff to rely on the constitution.

10. Finally, it is contended that if this court allows the plaintiff to bypass the claims provided for in the two pieces of legislation and to fall back on s 27 of the Constitution, I would be allowing the plaintiff to circumvent legislation, which it is common cause, has been passed by Parliament for the purpose of promoting the s 27 right. The defendant says that if the exception is allowed on this ground the leading of evidence on the quantum of the plaintiff's claim will be obviated, thus disposing of a significant portion of the litigation. Indeed, it would obviate the leading of evidence on questions such as the defendant's registration of water users, water tariffs, the defendant's actual liability to pay water charges in respect of 25 alleged water users, the imposition of research levies and the defendant's liability for eight of these.¹⁰

11. As I have said, it has been argued on her behalf that the plaintiff expressly states that she is vindicating or endorsing the constitutional right of the people to water and the government's duty to provide it.¹¹ It is for that reason, so the plaintiff contends, that the relief is couched in the form of a just and equitable remedy. It is to ensure that the defendant meets its obligations in terms of the constitution. The plaintiff further contends that the averments in respect of water legislation are supportive of the constitutional cause of action and are not self-standing causes of action. They are referred to as proof of the constitutional complaint against the defendant and are nothing more than "triggers" to a cause of action.

12. As I understand the pleadings, the plaintiff's first prayer is for a declaration of constitutional invalidity based on the principle of legality, followed by further prayers for, as the plaintiff's counsel puts it, structured relief. It is significant, in my view, that the defendant has not excepted to the plaintiff's prayer for a declaration of invalidity. Nor has it excepted to the claim that the defendant be directed to report to this court on how it has complied with its constitutional obligations, - and to my mind, properly so. Section 172 of the Constitution, which outlines the powers of this court when dealing with constitutional matters, reads as follows:

‘172. Powers of courts in constitutional matters. –

¹⁰ According to the defendant's counsel there are close to 50 pages of factual allegations in the particulars of claim which would fall away.

¹¹ Paragraph 20 of the particulars of claim states:

‘20.1 this matter does not relate to the exercise of a statutory power or function but is aimed at vindicating the Constitution and seeking a just and equitable remedy against the defendant's breaches of its constitutional obligations as pleaded herein;

20.2 the issues to be determined in this matter are constitutional matters which are only justiciable by a court of law under section 172(1) of the Constitution which is the final arbiter of constitutional matters and

not the persons or entities referred to in IRFA’.

- (1) When deciding a constitutional matter within its power, a court –
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.⁷

13. It goes without saying that in order for the plaintiff to qualify for an order stating that the defendant's conduct is inconsistent with the Constitution and for a declaration of invalidity flowing therefrom (which order this court is compelled to make if the plaintiff succeeds)¹², the plaintiff (in the event of the impugned conduct being partly or wholly disputed) must allege and prove the conduct which it avers is inconsistent with the Constitution. In my view, the plaintiff has alleged this, as she was constrained to do in order to avoid excipiable pleadings, by:

- a. establishing her *locus standi* as a member of the Cabinet as contemplated in the Constitution;
- b. demonstrating her cause of action with reference to her constitutionally delegated powers, duties and responsibilities particularly with respect to the right to water enshrined in the Bill of Rights, and the mandatory responsibility on the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”¹³;
- c. establishing the *locus standi* of the defendant as a municipality as contemplated in the Constitution;
- d. demonstrating the defendant's role, powers, responsibilities and duties to give effect to the right to water as set forth in the Constitution and the subordinate water legislation promulgated in terms of the Constitution;
- e. illustrating how, when and where the defendant has behaved in a manner which is inconsistent with the Constitutional imperative to achieve the realisation of the right to water by, inter alia, failing to pay rates and charges levied in terms of the water legislation promulgated to give effect to the right to water and to ensure the provision of services to communities in a sustainable manner¹⁴;

¹² See for example *Buffalo City v Asla Construction* 2019 (4) SA 331 (CC) at para 101 and the Constitutional Court cases referred to in that judgment on the principle of legality.

¹³ In terms of s 27 (2) of the Constitution read with (inter alia) section 195(3) which states that national legislation must ensure the promotion of the values and principles listed in s 195 including for example the accountability of public administration. The legislative measures taken with respect to the right to water are set forth in the national water legislation cited by the plaintiff in her particulars of claim. Section 237 (also listed by the plaintiff) reiterates that all constitutional obligations must be performed diligently and without delay.

¹⁴ See inter alia s 152 of the Constitution dealing with the objects of local government.

- f. prevailing upon the court to declare that such conduct is inconsistent with the Constitution and accordingly invalid;
- g. requesting to the court thereafter to exercise the powers which flow from a declaration of invalidity and to make an order which it deems just and equitable, in terms of s 172;
- h. recommending or suggesting to the court that just and equitable relief in the circumstances would be to direct the defendant to forthwith comply with its constitutional obligations by adhering to the relevant water legislation and by giving account of the steps it has taken to pay the levies and charges;
- i. recommending or suggesting to the court that in the event that only the quantum of the defendant's debt is in dispute with respect to the payment of levies and charges, that a suitably qualified and competent entity be appointed to assist with the determination thereof.

14. In the result I cannot find any fault with the plaintiff's submission that the various Acts dealing with water legislation were referred to in the pleadings in order to demonstrate the defendant's failure to comply with its constitutional obligations and not to enforce the statutory provisions. In principle, I see no reason why a distinction ought to be made between the matter before me and those cases where municipalities who have made themselves guilty of conduct which is inconsistent with the Constitution have approached high courts in the spirit of self-redress for a declaration of invalidity, whereafter the courts, in terms of s 172 have invariably granted consequential just and equitable relief appropriate to the circumstances."

[12] Based on this reasoning, and after dealing with certain other matters raised in that exception, Stretch J dismissed the defendant's exception with costs.

[13] The decision of Stretch J is binding on me, not only as a decision of a court of equal footing within this division¹⁵, but because it is a decision which disposes of an issue in this very matter and is thus *res judicata*¹⁶. As indicated

¹⁵ In which case this court could only differ from therefrom if it were to find that her decision was clearly wrong.

¹⁶ In the attenuated form thereof known as "*issue estoppel*". Wallis JA has described *issue estoppel* in the following terms:

"Res judicata deals with the situation where the same parties are in dispute over the same cause of action and the same relief, and in the form of issue estoppel arises:

earlier in this judgment, the defendant has again argued (in response to the exception bought by the plaintiff) that it's special plea of prescription should be upheld on the basis that the plaintiff simply cannot choose or elect to base its cause of action under the Constitution when subordinate legislation has been enacted to deal therewith. This is nothing more than the same argument which served before Stretch J, namely that of subsidiarity. This issue has already been disposed of in the plaintiff's favour.

[14] The second issue is as to whether the special plea is legally sound on the basis that the constitutional obligations of the defendant as pleaded by the plaintiff are, nonetheless, subject to the Prescription Act, and that those obligations which arose more than three years before the issue of summons have thus prescribed.

[15] A useful starting point to this inquiry is the case of **Njongi v MEC, Department of Welfare, Eastern Cape**¹⁷ upon which the plaintiff places reliance for its submission that constitutional obligations such as those borne by the defendant (as pleaded by the plaintiff) are not debts and do not prescribe. Yacoob J said in this regard:

"I have doubts whether prescription could legitimately arise when the debt that is claimed is a social grant; where the obligation in respect of which performance is sought is one which the Government is obliged to perform in terms of the

'Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; . . .'¹⁶

¹⁷ 2008 (4) SA 237 (CC) at paragraph 42

Constitution; and where the non-performance of the Government represents conduct that is inconsistent with the Constitution. Despite constitutional concerns, I reluctantly conclude that this important issue should not be decided in this judgment. There are two reasons for this. The first is that the question was not raised before and therefore not considered by either the High Court or the Full Court. Secondly, possible injustice consequent upon a successful plea of prescription can be averted without deciding whether prescription can be raised by the State at all in these circumstances. This case is decidedly not a precedent for the proposition that the defence of prescription is available to the State in these circumstances.

[16] The defendant has correctly argued that this is obiter. Yacoob J, in the final line of the quoted paragraph, made it clear that Njongi's case was not to be regarded as a precedent for the state in future cases to argue that prescription is available when constitutional obligations borne by the state are in question. This is so because the Constitutional Court decided the issue on a different basis without having to reach a final decision with regard to prescription of the state's constitutional obligations. It is quite clear therefore that he left the question open but made it clear that his view was that such obligations were not "debts" for the purposes of the Prescription Act.

[17] I share this view. It seems to me that in the present matter the defendant's role, powers, responsibilities and duties to give effect to the right to water as set forth in the Constitution (and as pleaded by the plaintiff in her particulars of claim), and the subordinate water legislation promulgated in terms of the Constitution, cannot amount to "debts" for the purposes of the of the Prescription Act as this would lead to an undermining of the very purpose of such a right created under the Constitution. Were a state entity such as the defendant able to claim that its obligations in this regard prescribe after a period of three years, the progressive realization of such rights could never be achieved. In any event, in my view the Prescription Act remains legislation which is subordinate to the Constitution. The legitimacy of its provisions, or any

one of them, maybe questioned and measured as against the Constitution and the principles enshrined therein. Had the Constitution intended that such obligations were to be struck by the provisions of the Prescription Act, it would surely have said so. More tellingly, were such a situation to prevail, the courts would inevitably be hamstrung in dealing with such conduct on the part of the state which is inconsistent with the Constitution pursuant to the provisions of section 172(1)(a) of the Constitution (which requires a court to declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency).

[18] There is a further reason as to why the special plea should fail. In the case of **Off-Beat Holiday Club and Another v Sanibonani Holiday Spar Shareblock Ltd and Others**¹⁸ the Constitutional Court held as follows:

[41] The court in granting just and equitable relief cannot of course revive prescribed debts. But it can take them into account in assessing whether governance calls for a just and equitable remedy now. It may be that, in practice, it will be difficult to fashion a remedy that takes these considerations into account. But that is not a reason for barring the court's power, *a priori*, on the ground that the debts have prescribed.

[42] The practical value of understanding the provision in this way is that it enables a court to determine the complaint without an applicant being barred at the outset on the basis that the source of the claim is a debt that has long prescribed. The provision is about institutional governance. It provides a crucial mechanism to keep corporate bullying at bay. An understanding of the provision that furthers this aim is one that should be adopted.

[19] That matter dealt with section 252 of the largely repealed Companies Act of 1973¹⁹ which allowed the courts to provide an equitable remedy to minority

¹⁸ 2017 (5) SA 9 (CC) at paragraphs 41 and 42.

¹⁹ Act 61 of 1973

shareholders aggrieved by “*unfairly prejudicial, unjust or inequitable*” conduct by the majority or the board. Section 172 is, similarly, a crucial mechanism for keeping public administration in check. It thus serves a similar function to section 252 of the Companies Act but is far broader in that it has a constitutional imperative. Section 172(1)(a) of the Constitution obliges a court, once it has found that any law or conduct is inconsistent with the Constitution, to declare such conduct invalid to the extent of its inconsistency. Subsection (b) however gives the court a wide discretion to make any order that is “just and equitable”²⁰.

[20] It seems to me clear therefore that in considering relief which is just and equitable pursuant to the provisions of section 172(1)(b) the court must be entitled to consider prescribed debts. In doing so, the court does not have the power to revive such debts if they have indeed prescribed pursuant to the Prescription Act, but it has the power to consider the ramifications of such debts in dealing with the broad discretion conferred upon it by this subsection.

[21] It follows from this that the special plea cannot be good in law both because the constitutional obligations of the defendant as alleged by the plaintiff cannot prescribe and because, even if the debts arising from the subordinate legislation have prescribed, the court can still consider them in fashioning the relief it should grant. From this it follows further that the exception to the special plea, and to those parts of the plea that raise the question of prescription,

²⁰ Allpay Consolidated Investment Holdings (PTY) LTD and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC); Khumalo and Another v MEC for education, KwaZulu Natal 2014 (5) SA 579 (CC) at paragraph 53; BW Bright Water Way Props (PTY) LTD v Eastern Cape Development Corporation 2019 (6) SA 443 (ECG); Ngomane and Others v Johannesburg (City) and Another 2020 (1) SA 52 (SCA).

must be upheld on the basis that, in this regard, the objections raised in the exception go to the root of the defence²¹.

[22] In my view, this finding does not mean that the plaintiff is absolved from proving its case. On the contrary, the plaintiff is still obliged to prove all those aspects it has pleaded as summarized in paragraph 13 of the judgment of Stretch J as quoted above.

[23] This then disposes of the first ground of the special plea which falls to be upheld.

[24] As regards the second ground, exception is taken to paragraphs 30.1, 30.2 and 32 of the defendant's plea. It seems to me that it is only subparagraph 30.2 thereof which falls foul of this court's decision as set out above in that it again raises the question of prescription. Subparagraph 30.1 and paragraph 32, as read with the rest of the plea, in my view validly raise a denial that the plaintiff has indeed raised the water use charges and/or levies or has claimed them from the defendant. The plaintiff is put to the proof of these aspects and the plea cannot be excipiable on this ground.

[25] The third ground (sub paragraphs 33.1 – 33.3 of the plea) again raises the question of prescription and falls foul of the above conclusions. The exception must accordingly succeed.

²¹ Minister of Safety and Security and Another v Hamilton 2001 (3) SA 50 (SCA) at paragraph 5; Trustees for the time being of the Children's Resource Centre Trust and Others v Pioneer Food (PTY) LTD and Others (Legal Resources Centre as amicus curiae) 2013 (2) SA 213 (SCA) at paragraph 36.

[26] Finally, the fourth, fifth and sixth grounds once again raise a denial that the various levies were indeed raised and/or claimed by the plaintiff from the defendant. They are not excipiable.

[27] As regards the question of costs, the plaintiff has asked that these be reserved for decision by the trial court which the defendant has agreed to.

[28] The following order is made:

- 1. The plaintiff's exception to the defendant's special plea and paragraphs 30.2 and 33.1 – 33.3 of the defendant's plea is upheld;**
- 2. The plaintiff's exception to various other paragraphs of the defendant's plea is dismissed;**
- 3. The defendant is granted leave to amend its special plea and plea within 21 days of this order;**
- 4. Should the defendant fail to amend its special plea in accordance with paragraph 3 of this order, the special plea is dismissed.**
- 5. The costs of the exception are reserved for decision by the trial court.**

R E GRIFFITHS

JUDGE OF THE HIGH COURT

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: with Mr Skhakane

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: with Ms Cole

INSTRUCTED BY : Lionel Trichardt & Associates

HEARD ON : 06 AUGUST 2020

DELIVERED ON : 01 SEPTEMBER 2020