IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

26/07/12

Case No:35672/12

In the matter between:

THE FEDERATION FOR SUSTAINABLE ENVIRONMENT	1ST APPLICANT
THE SILOBELA CONCERNED COMMUNITY	2ND APPLICANT

And

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

2012-07-26 (DATE) ..... (SIGNATURE)

THE MINISTER OF WATER AFFAIRS	1ST RESPONDENT
THE DIRECTOR GENERAL: WATER AFFAIRS	2ND RESPONDENT
ACTING CHIEF DIRECTOR GENERAL OF WATER AFFAIRS MPUMALANGA	3RD RESPONDENT

DIRECTOR OF WATER AFFAIRS: MPUMALANGA WATER SECTOR REGULATION AND USE	4TH RESPONDENT
MEC CO-OPERATIVE GORVANCE AND TRADITIONAL AFFAIRS, MPUMALANGA	5TH RESPONDENT
ACTING EXECUTIVE MAYOR: THE GERT SIBANDA DISTRICT MUNICIPALITY	6TH RESPONDENT
MUNICIPAL MANAGER: THE GERT SIBANDA DISTRICT MUNICIPALITY	7TH RESPONDENT
THE MAYOR: THE ALBERT LUTHULI LOCAL MUNICIPALITY	8TH RESPONDENT
MUNICIPAL MANAGER: THE ALBERT LUTHULI LOCAL MUNICIPALITY	9TH RESPONDENT
KOMATI CATCHMENT AGENCY	10TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] On the 10 July 2012, consequent to an urgent application brought by the applicants, I granted the following order:

"1. That the application was urgent and the Applicants' non- compliance with the forms and service provided in terms of the Rules of Court, to the extent necessary is condoned;

2. That the Sixth and Seventh Respondents are ordered to provide temporary potable water in line with regulations 3(b) of the regulations relating to compulsory national standards and measures to conserve water (GN 509 in GG 22355 (8 June 2001)) to the residents of Silobela, Caropark and Carolina Town in Carolina, Mpumalanga within 72 hours of the order of this court;

3 That the Sixth and Seventh Respondents are directed to engage actively and meaningfully with the First and Second Applicants regarding:

3.1 the steps being taken to ensure that potable water can once again be supplied through the water supply services in Silobela, Caropark and Carolina Town in Carolina, Mpumalanga; and

3.2 where, when, what volume, and how regularly temporary water will be made available in the interim;

4. That the Sixth and Seventh Respondents are ordered to report to this court within one month of this court order as to the measures that have been taken to ensure that portable water is supplied through the water services in Silobela, Caropark and Carolina Town in Carolina, Mpumalanga;

5. That any party is permitted to subsequently re-enroll the application for hearing on the same papers, duly supplemented, on reasonable notice to the other parties;

6. That the sixth to ninth Respondents are jointly and severally, the one paying the other to be absolved; to pay the costs occasioned by this application, on party and party scale, which costs shall include the costs of 2 (two) counsels.

7 That no order is made against the other respondents not mentioned in the orders herein above."

[2] The sixth to ninth respondents in the main application, as first to fourth applicants respectively, are now bringing an application for leave to appeal against this judgment to the Supreme Court of Appeal alternatively to the Full Bench of this Division. The applicants in the

main application, as first and second respondents respectively, are opposing this application for leave to appeal.

[3] On the other hand, the applicants in the main application, brought an application in terms of Rule 49(11) to have paragraphs 2 up to 5 of the above order of 10 July 2012 operational and executable and not suspended, pending the finalization of:

(i) any application for leave to appeal;

(ii) if same is refused, pending any application to the Supreme Court of Appeal and or the Constitutional Court,

(iii) and or an appeal.

[4] For purposes of convenience, I shall refer to the parties as they were referred to in the main application. I shall deal simultaneously with both respective applications, for leave to appeal and in terms of rule 49(11). It needs to be noted that both applications were strongly opposed by the respective opponents to the relevant application. I do not intend to chronicle in detail the respective contention in support of and

opposition of the relevant applications, nor traverse all the submissions.

[5] I shall also bear in mind the applicable principles in the respective applications. Firstly it is trite that in an application for leave to appeal, the question to be asked is whether there are reasonable prospects of success on appeal. The Court against whose judgment leave to appeal is sought, should disavow its mind of any bias and objectively consider whether there are prospects that another court might decide otherwise. Even if the court believes of the correctness of its judgment, it should nonetheless grant leave to appeal, if there is a possibility that a court of appeal might conclude differently; *vide R v Kuzwayo*[1]; *Westinghouse Brake & Equip v Bilger Engineering*[2].

[6] In the circumstances of this case, in my view, I should also have regard to the importance of the matter to both parties, the grounds upon which leave to appeal is premised, and whether leave to appeal

[1] 1949 (3) 761(AD) at 764-765.
[2] 1986 (2) SA 555 (AD) at 564C-E.

is *bona fide* and not frivolously sought, in exercising my discretion. If the granting of leave to appeal would expedite the resolution of the dispute between the parties, then I must be inclined to grant leave to appeal, bearing in mind whether there is a prospect of success that another court minght find differently to my decision appealed against; vide *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another; Pharmaceutical Society of South Africa v Minister of Health and Another* [3].

[7] The grounds upon which the application for leave to appeal are comprehensively set out in the relevant notice, as such I deem it not necessary to chronicle these, for purposes of this judgment.

[8] It is trite that an application for leave to appeal automatically suspends the operation of the order against which leave to appeal is sought. The party who seeks an order in terms of Rule 49(11) that the operation and execution of such order be not suspended, bears a general *onus* to show why such relief should be granted. Such an *onus* would be

[3] 2005 (3) SA 231 (CPD) at 236 H- 237A.

discharged on a balance of probability; *vide Tuckers Land and Development Corporation v Soja*[4]. The respondent who opposes the grant of such an order, must show why leave to execute should not be granted; *vide Antares* (Pty) Ltd[5].

[9] The Court has a wide discretion to grant an order putting into effect the operation and execution of the order against which the leave to appeal is sought. The Court must determine what is just and equitable in all the circumstances of that particular case. The Court in doing so, must have regard to the following factors, *inter alia*:

(a) potentiality of irreparable harm or prejudice being sustained by:

(i) the appellant on appeal if leave to execute were to be granted;

(ii) the respondent if leave to execute were to be refused.

(b) the prospect of success on appeal, including more particularly the question as to whether or not the appeal noted is vexatious or *bona fide*;

[4] 1980 (1) SA WLD 691 at 696H.
[5] 1977 (4) SA (WLD) 29 at 30H.

(c) whether there is a potentiality of harm irreparable harm or prejudice to either the appellant or respondent, the balance of hardship or convenience to either of the parties.

AD APPLICATION FOR LEAVE TO APPEAL

[10] The crisp point, *inter alia*, forcefully taken by the sixth and seventh respondents, is that:

(i) the sixth and seventh respondents are not the water service authority obligated to provide water services in the affected area (Carolina), and in particular tank water;

(ii) the eighth and ninth respondents are the water service authority obligated to provide bulk water and infrastructural services as the local authority, but there is no order against them to do so,

(iii) regulation 3 does not obligate the respondents to provide potable water, save for regulation 4 upon which the applicants did not rely;

(iv) the eighth and ninth respondent have been ordered to pay the costs, jointly and or severally with the sixth and seventh

respondent without there being any adverse decision of unlawfulness conduct on their part;

(v) the applicants did not prove the general *onus* resting upon them, and the case in terms of *Plascon Evans* principle should have been decided on the version of the respondents and the application should have been dismissed with costs.

[11] The nub of the point taken by the sixth and seventh respondents is that, they are not accredited as water service providers and therefore cannot comply with the order. In my view, this type of attitude is tantamount to dereliction on technical grounds of the statutory duties and responsibilities placed not only on a district municipality, but also the local municipality, *in casu*, also the eighth and ninth respondents who say that the order does not direct them to provide the services in issue.

[12] Both the district municipality, of which the sixth and seventh respondents are, and the local municipality, of which both eighth and ninth respondents are, are organ of State, both established in terms

of s155 of the Constitution,[6] within the local sphere of government, tasked with the exercise of co-operative governance[7] within the broad mandate of providing basic necessities, such as water to ensure healthy service to the communities within their area. They must co-operate with one another and enhance that co-operation and assist one another to solve problems that arise in their area. Section 8[8] places an obligation on municipalities, both district and local, in my view, "to do anything reasonably necessary, for, or incidental to, the effective performance of its functions and exercise of its powers."

[13] Both district municipality and local municipality are obliged to respect the rights of the communities in their area, that are enshrined in the Bill of Rights[9]. The right in issue *in casu* is enshrined in s27(1)(b) of the Constitution. The particular section does not only guarantee being provided with basic water, but it is much profound. It deals with health as well (27(1)(b). This section also places, in my view, an obligation on all spheres of governance to ensure a healthy environment to the communities. The State must take reasonable legislative measures,

[6] S155 of the Constitution of Republic of South Africa, Act No 108 of 1966
[7] S3 of Local Government; Municipal Systems Act no. 32 of 2000.
[8] S8(2)of Local Government; Municipal Systems Act no. 32 of 2000
[9] S 4(3) of Local Government; Municipal Systems Act no. 32 of 2000.

within its available resources, to achieve the progressive realization of these rights[10].

[14] It needs mention that the *Water Service Act* 108 of 1997 defines "water service authority" to mean any municipality, including a district or rural council as defined in the *Local Government Act* 1993, responsible for ensuring access to water services. In my view, both the district and local municipalities are included in this definition.

[15] In *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 at 8 para [21] stated that a water service institution is defined in the *Water Service Act* to include both a water authority and water service provider. These institutions are tasked with the obligation of providing "basic water supply" that meets "minimum standard of water supply service necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene."

[10] Minister of Heath & Others v Treatment Action Campaign & Others (NO: 2) 2002 (5) SA 721 CC TAC

[16] The Court in the *Mazibuko* matter (supra) at 22D at para 67 the court held that:

"Thus the positive obligations imposed upon government by the social and economic rights in our constitution will bill be enforced by the courts in at least the following ways. If the government takes no steps to realize the rights, the court will require the government to take steps..." *In casu* the sixth and seventh respondent were ordered to provide the services. In my view, the sixth to ninth respondents cannot abdicate the responsibility of providing the basic services encapsulated in the fundamental rights to the Silobela community.[11]

[17] It needs mention that s84(1)(b) of the *Local Government Municipality Structures Act* provides that:

"1. A district municipality has the following functions and powers:

(b) Potable water supply system."

The respondents in their capacity as the third and lowest sphere of government and closest to the communities, are expected to develop service provision of basic needs, if need be, in my view, to be

[11] Vide s6 (2)(a) of Local Government; Municipal Systems Act no. 32 of 2000

innovative in order to progressively realize these constitutional imperatives.

[18] Taking all the above, I am therefore of the view that another court, objectively interrogating the facts of this case, will not find otherwise than this court did.

[19] However, the matter is of importance to both parties, in my view. In the event I were not to grant the application for leave to appeal, the respondents, whose pocket is not limited, can still petition and further prolong the matter. On the contrary were I to grant leave to appeal, it would avert the costly exercise of having to petition, and facilitate in expeditiously bringing the matter to finality. In the premises, it would be prudent that I should incline towards granting leave to appeal to the Full Bench of this Division.

AD RULE 49(11)

[20] It is common cause that after the judgment of 10 July 2012, the water in the relevant area still had high two exceptionally high substances,, a pH and aluminum which present health risk[12] which refutes the allegation that the water is safe for human consumption.

[21] In the *Mazibuko* matter *supra* at page 4A-B, O'Regan J stated that "...Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow their food. Without it, we will die. It is not surprising that our constitution entrenched the right of access to water..."

[22] The Committee on Economic, Social and Cultural Rights has adopted the approach that:

" The water supply for each person must be sufficient and continuous for personal, domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, persona and household hygiene.

[12] Paginated page subparagraphs 41.2 and 42.1

The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines."[13]

[23] The quality of water provided must be hygienic. In my view, there is no room for half measures in providing water. The respondents contended that there are no people dying and that the situation is exaggerated for political gain by the applicants but the water is fit for human consumption. We need not see people dying before we hold the respondents to comply with their constitutional imperatives. There is evidence placed before me that subsequent to the granting of the order the 10 July 2012, there is still inadequate water supply. According to the evidence placed before me, which I do accept, some of the jojo tanks are not refilled regularly and some remain empty. Cleary the respondents are not complying with the order. Besides, their attitude is that the order is unenforceable.

[24] The contention of the respondents that the order is unenforceable, for the reasons that I detailed earlier herein above, is unacceptable. The community stands to suffer more harm than the respondents. The

[13] Socio-Economic Rights in South Africa, Danie Brand and Christof Heyns, 2005 page 198.

respondents, in my view, cannot suffer greater harm than that which will be suffered by the community in the form of health risk, to say the least. I am of the view that in balancing the respective rights of the parties, I must incline towards protection of the rights of the community and uplift the suspension of the operation of the order, pending finalization of an appeal and exhaustion of any possible appeal to the Supreme Court of Appeal and or the Constitutional Court.

[25] The applicants in regard to the Rule 49(11) confined themselves only to orders 2 to 5. They do accept that order 6 which deals with costs, remain suspended pending the finalization of the appeal. This is in my view a sensible approach.

[26] The sixth to ninth respondents brought the application for leave to appeal. These respondents opposed the application in terms of Rule 49(11). In so far as the costs of the application for leave to appeal these would be costs on the appeal. In so far as the costs for the Rule 49(11) these must be borne by the sixth to ninth respondents.

[27] In the premises I make the following orders:

1. **That leave to appeal to the Full Bench of this Division against the judgment and order of 10 July 2012 is granted;**

2 **That costs of the application for leave to appeal be costs in the appeal;**

3 **That in terms of Rule 49(11) the operation and execution of paragraphs 2 to 5 of the order granted on 10 July 2012 are suspended pending finalization of any appeal to the Full Bench, and or to the Supreme Court of Appeal, and or to the Constitutional Court;**

4 **That the sixth to seventh respondents are ordered, pending the events set out in order 3 hereof supra to comply with paragraphs 2 to 5 of the order of 10 July 2012 from date of this order.**

5 That the sixth to ninth respondents are jointly and severally ordered to pay the costs of the Rule 49(11) application.

N. M. MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE	: 23 / JULY / 2012
DATE OF JUDGEMENT	: 26 / JULY / 2012
1ST & 2ND APPLICANTS' ATT	: LEGAL RESOURCES CENTRE
1ST & 2ND APPLICANTS'ADV	: ADV J.R. BRICKHILL
6TH –9TH RESPONDET'S' ATT	: TWALA ATTORNEYS
6TH –9TH RESPONDET'S ADV	: ADV L.P. MKHIZE