

Environment - South Africa

National Water Act: challenging appeal decisions

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Introduction

In 2012 the Supreme Court of Appeal and the North Gauteng High Court delivered two judgments regarding the functioning of the Water Tribunal.

These judgments were handed down subsequent to the effective disbandment of the Water Tribunal at the end of August 2012 when the tenure of its deputy chairperson and members expired.⁽¹⁾ The minister of water and environmental affairs failed to appoint a new panel as laid down in the National Water Act (36/1998); consequently, there has been no functioning Water Tribunal since that time.

This situation is problematic. The Water Tribunal is supposed to be the forum for hearing appeals under the National Water Act, including appeals against:

- directives issued under Sections 19 and 53 of the act;
- decisions on temporary transfers of a water-use authorisation; and
- decisions of the responsible authority on a water licence application by both the applicant and objectors to the licence.

An appeal does not suspend a directive issued under certain sections of the act, but it does suspend any other relevant decision, direction, requirement or limitation, pending the disposal of the appeal, unless the minister directs otherwise. The appeals provision has an extraordinary reach: a water use licence is suspended automatically if an appeal is lodged against it; the licence holder must petition the minister to direct otherwise.

This update discusses the Supreme Court of Appeal's decision in *Goede Wellington Boerdery*⁽²⁾ and the North Gauteng High Court's judgment in *Exxaro Coal*,⁽³⁾ and possible remedies where an appeal of a decision made under the act is not possible.

While the facts of the two cases are different, in both judgments the minister's failure to make appointments necessary to ensure the proper functioning of the Water Tribunal came under criticism.

Water Tribunal

Section 146 of the act established the Water Tribunal. Members of the tribunal must be appointed by the minister on the Judicial Service Commission's recommendation. The act does not specifically allow for the disbandment of the tribunal; the existence of the tribunal is not at the minister's discretion.

The minister's justification for not appointing new members to the tribunal after August 2012 was apparently due to the minister's intention to amend the act. However, no steps were taken in respect of such amendments and, in the interim, the minister issued a directive declaring that parties to appeals before the Water Tribunal should submit their disputes to a mediation panel.

The courts held that this was an inappropriate solution as:

- mediation does not result in a final decision;
- no binding ruling can be made; and

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- a mediation panel is not competent to make decisions on water-use licence applications.

Regardless of whether legislative amendments are intended or pending, the act does not contemplate a situation where there is no functioning Water Tribunal.

Exxaro Coal

In 2012 Exxaro received two directives under Section 53 of the act for allegedly using water in contravention of the act. Exxaro appealed against these directives as is permitted under Section 148(1)(j). A notice of appeal was delivered in July 2012, but the Water Tribunal was disbanded shortly thereafter; therefore, the matter could not be adjudicated by the tribunal.

In the interim, a directive to mediate under Section 150(1) was circulated to all parties with appeals pending before the Water Tribunal. This directive stated that the operations of the Water Tribunal had been "placed in abeyance pending a legislative amendment process" of the National Water Act, and that appeals must be dealt with by a mediation panel "as an interim arrangement".

The North Gauteng High Court considered whether this was a competent decision. It held that the directive was outside the scope of the minister's powers because:

- appellants were directed to "mediate instead of proceeding with an appeal";
- "no binding ruling can be made through mediation"; and
- the minister did not "intend to appoint a Tribunal, as the [act] requires her to do".

The court held that this was "an error in law as mediation cannot replace appeals", according to the act. Consequently, the directive to mediate was found to be invalid and *ultra vires* (outside the scope of her powers). Further, the court stated that "such a directive can never take away the right of appeal which was created by legislation".

The principal reason for this interim measure was due to the apparent intention to amend the act. However, no draft amendment had been published and no timeline detailing the intended amendments was made available to the court. The court held that this directive was an "administrative action not authorised by the [act] and is a procedure directed to circumvent the necessity to appoint a Water Tribunal".

The court held that the minister must comply with the act by filling the vacancies on the Water Tribunal.

In its order, the court suspended the directives issued against Exxaro Coal pending determination on appeal. However, it did not grant all the relief sought – specifically, the request for an order to compel the minister to appoint a tribunal. This request was postponed in order to enable the minister to comply with the act, as the court was reluctant to interfere with the executive's legal obligations.

The minister is likely to appeal this decision.⁽⁴⁾

Goede Wellington

Goede Wellington Boerdery (Pty) Ltd, the owner of a farm in the Western Cape, applied for a water use licence to facilitate the development of a high-quality citrus orchard. Its application was denied by the Department of Water Affairs. Goede Wellington appealed to the Water Tribunal, which also denied the application.

Consequently, Goede Wellington proceeded with a review application to the North Gauteng High Court, which set aside the tribunal's decision, substituted the decision with a new order and granted the water use licence.

This matter was appealed to the Supreme Court of Appeal by the minister (among others).

The department and the tribunal did not grant the water use licence sought by Goede Wellington because the application allegedly did not comply with Section 27(1)(b) of the act, which provides that, in issuing a licence, the responsible authority must take into account all relevant factors, including "the need to redress the results of past racial and gender discrimination".

Section 27 of the act contains the considerations which must be taken into account before a responsible authority decides to issue a water use licence. However, the Supreme Court of Appeal deemed this to be a "non-exhaustive list" of several factors to be considered, and held that there is no indication in the act that one factor supersedes others in importance. Therefore, the considerations regarding making a decision on whether to issue a water use licence include "the need to redress the results of past racial and gender discrimination" as laid down in Section 27(1)(b)), but this specific item under Section 27 does not trump all other considerations. As was stated in the judgment, "transformation can be achieved in various ways".

The Supreme Court of Appeal concluded that the tribunal's decision was an administrative action capable of being reviewed under the Promotion of Administrative Justice Act (3/2000), because the nature of the decision "was no less and no more than a consideration of whether a water use licence should be granted or not".

Courts generally do not overstep the limits imposed by the separation of powers doctrine. This means that a court would only in "exceptional circumstances" substitute an order such as that of the tribunal, which is usually a functionary designated to consider specific matters and which has expertise in relation to such matters. The Supreme Court of Appeal held this case to be 'exceptional', as remittance back to the Water Tribunal would result in an indefinite delay, as the tribunal was no longer functioning and neither counsel could indicate to the court whether and when the tribunal would be functional again.

As a result, the Supreme Court of Appeal held that the matter was exceptional based on considerations of fairness, and that the courts were in a position to decide on the issue of the licence.

Moreover, the Supreme Court of Appeal was "astounded" by the minister's intention to refer the matter to mediation, as a mediation panel is not a body appropriate to consider the application for awarding licences.

Comment

In light of the existing circumstances, parties cannot effectively appeal directives and licence decisions made in terms of the act, as there is no functioning Water Tribunal.

Subject to legal advice on the specific circumstances of each case, it may be sensible to submit an appeal to the department or the minister and serve a copy on the responsible authority. This could be done in anticipation of a possible review or mandamus application to a high court should the department or minister fail to suspend the directive, even where good reasons for suspension exist. There may even be grounds to proceed directly to a high court for an appropriate order regarding the directive or licence.

As appeals do not suspend directives issued, among other sections, under Section 53 of the act, the only relief may be to approach a high court on review, as was done in *Exxaro*.

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Endnotes

(1) The reasons for this are not dealt with in this update; however, in reply to question 2280 in Parliament on August 24 2012, the minister of water and environmental affairs indicated that the Department of Water Affairs "has investigated legislative amendments to improve the operations of the Water Tribunal". The minister's reply continued that:

"the operations of Water Tribunal have been held in abeyance pending the legislative amendments. As an interim solution to resolving the disputes the provisions of section 150 of the National Water Act, 1998 (Act No. 36 of 1998) ... which provides for mediation and negotiation as a solution to deal with all 44 disputes / appeals is being implemented".

(2) *Makhanya v Goede Wellington Boerdery (Pty) Ltd* (230/12) [2012] ZASCA 205 (November 30 2012) reported 2012 JDR 2320 (SCA).

(3) *Exxaro Coal (Mpumalanga) (Pty) Ltd v The Minister of Water Affairs* (case 63939/2012, December 7 2012).

(4) See www.info.gov.za/speech/DynamicAction?pageid=461&sid=33378&tid=95064 <http://cer.org.za/exxaro-coal-v-minister-of-water-affairs-and-judicial->

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