IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 2025-111881

In the matter between:

SAKELIGA NPC	First Applicant
TRANSVAAL AGRICULTURAL UNION OF SOUTH AFRICA	Second Applicant
CT VAN DER MERWE BOERDERY (PTY) LTD	Third Applicant
TWYFEL NIE PLASE (PTY) LTD	Fourth Applicant
BLOUBERG SITRUS (PTY) LTD	Fifth Applicant
PONTDRIF CITRUS (PTY) LTD	Sixth Applicant
CORFUSCORE (PTY) LTD	Seventh Applicant
MOSIMA BELEGGINGS (PTY) LTD	Eighth Applicant

and

MINISTER OF WATER AND SANITATION	First Respondent
DIRECTOR-GENERAL DEPARTMENT OF WATER AND SANITATION	Second Respondent
DEPARTMENT OF WATER AND SANITATION	Third Respondent

APPLICANTS' CONCISE HEADS OF ARGUMENT

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INTRODUCTION:

1 This is an application for declaratory relief that water use charges for water lawfully utilized as part of commercial enterprises prescribe after three years.

2 The Department of Water Affairs appears insistent that it can essentially claim payment for water use charges for an unlimited period.

3 Further relief is also sought to the effect that the Respondents should be compelled to render proper and complete accounts.

4 The first two Applicants are organizations representing members that are commercial users of water through water use entitlements and that receive accounts in this regard. A large number of such users are currently confronted by demands for payment of debts older than three years.

5 The remaining Applicants are commercial irrigators themselves that lawfully utilize water. Payment of debts older than three years is also demanded from them.

THE APPLICABLE LEGAL PRINCIPLES:

STATUTORY PROVISIONS OF RELEVANCE:

6 Section 56 of the National Water Act "(NWA") dictates that the Minister may determine a pricing strategy for charges of any water use in the framework of existing relevant Government policy in concurrence with the Minister of Finance.

7 It suffices for present purposes that it is admitted in principle that water use charges may be charged under the current legislation.

8 Importantly, Section 57(5) of the NWA dictates that:

9 *"No charge under this act* ***may be of such a nature as to constitute the imposition of a tax, levy or duty****."* (own emphasis)

10 Section 11(a) of the Prescription Act, 68 of 1969, dictates that a thirty year prescription period applies in respect of *"any debt in respect of any taxation imposed or levied by or under any law".*

11 It is clear that water use charges are not taxes.

12 Section 11(d) of the Prescription Act deals with the prescription period of relevance. This Section reads:

"Save where an Act of Parliament provides otherwise, three years in respect of any other debt."

13 Section 59(1) of the NWA indicates that water use charges may only be made in respect of water used to which a person voluntarily committed and must bear a direct relationship to the water use in question. This indicates that billing water

use charges is supposed to be based on consumption of water under a water use entitlement. This would, of course, need to be reflected in proper invoices.

14 The Department's (incorrect) view in relation to the prescription issue is largely based on an unreported judgment in the Eastern Cape. This will be canvassed *infra*.

CRITICISM OF AND NOT BEING BOUND BY THE JUDGMENT IN MINISTER OF WATER AND SANITATION v. AMATOLE DISTRICT MUNICIPALITY:

15 It should firstly be noted that the unreported judgment is by a single Judge in another Division (Eastern Cape, East London).

16 It is thus no binding authority. A copy of this unreported judgment is annexed for ease of reference.

17 An important distinction is that no Organs of State are litigating from the side of the Applicants herein. All Applicants are private irrigators, or organisations representing private actors.

18 If one has regard to paragraph 1 of the unreported judgment, the cause of action in respect of some of the relief therein was premised on Section 1(a) to (c), Section 2, Section 7(2), Section 152, Section 195 and Section 237 of the *Constitution of the Republic of South Africa*, 1996 ('the Constitution").

19 Section 1(a) to (c) of the *Constitution* deals with the foundational values on which the Republic of South Africa is founded. It is trite that these sections cannot provide a cause of action for claiming of any relief.

20 Section 7(2) of the *Constitution* imposes obligations on the State to respect, protect, promote and fulfil the rights in the Bill of Rights. This Section has no application on private persons or entities.

21 Section 152 of the Constitution spells out the constitutional objectives of Local Government. This is, once again, not of application to private persons or entities.

22 Section 195 of the *Constitution* spells out the basic values and principles of public administration. Section 237 states that all constitutional obligations must be performed diligently and without delay.

23 It is clear that none of this will find application in respect of private actors.

24 It would appear that at best the unreported judgment could only be authority for the over-broad proposition (between Organs of State) that payment of such liability or debt could possibly be regarded as a constitutional obligation.

25 The Respondents are wrong in their assertion that the cause of action, if private irrigators are to be sued, would emanate from Section 27(1)(b) of the *Constitution*.

26 In terms of that Section everyone has the right to have access to sufficient food and water.

27 It is clear that the “water” envisaged in this Section would be potable water used for basic human necessities and sanitation.

28 There is no constitutional right for everyone to have access to irrigation water. There is certainly no general access to water for commercial purposes or right thereto. One applies to possibly be awarded an allocation of such water use for

irrigation, unless it emanates from an existing lawful use that predates the enactment of NWA.

29 Section 4 of the NWA read with Schedule 1 thereof makes it clear that **no water use authorization is required to use water for normal household purposes**. It follows that no water use charges in terms of the NWA will also be payable on water used for household purposes.

30 Further guidance can be obtained in some older judgments. In ***Mazibuko & Others v. City of Johannesburg & Others,*** **2010 (4) SA 1 (CC)** the Constitutional Court appears to steer in the direction that Section 27 only caters for water used for basic necessities of life.

31 Water use entitlements for irrigation are statutory rights.

See: ***Impala Water Users Association v. Lourens N.O. & Others,*** **2008 (2) SA 495 (SCA), paragraph [18].**

32 The NWA has its origins in Section 25(8) of the *Constitution* and is not Section 27 legislation (providing access to potable water).

33 It would also appear that the unreported judgment is wrong in a number of respects.

34 In paragraph [11] to [13] of the unreported judgment it becomes clear that Griffiths J was (incorrectly) of the view that the matter had already been decided earlier by Stretch J when considering a judgment in relation to an exception. The unreported judgment departed from the (incorrect) premises that that other judgment, dealing with the exception, would be binding.

35 In ***Blaauwbosch Diamonds Ltd v. Union Government (Minister of Finance)*, 1915 AD 590 at 601**, the Appellate Division held that:

"… and regarding this matter from that standpoint, one would say that an order dismissing an exception is not the final word in the shoot on that point (in) that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and though the Court is hardly likely to change its mind, there is no legal obstacle to it doing so upon a consideration of fresh argument and further authority."

36 The ***Blaauwbosch**-judgment* was recently confirmed in the Supreme Court of Appeal in ***Maize Board v. Tiger Oats Ltd,* 2005 (5) SA 365 (SCA) at paragraph [12].**

37 Griffiths J was accordingly wrong when he thought the issue was *res iudicata* and that he was bound by the earlier decision.

38 A debt has been defined in ***Makate v. Vodacom (Pty) Ltd,* 2016 (4) SA 121 (CC) at paragraph [92]**, in accordance with its ordinary dictionary meaning, namely something (such as money, goods or service) which one person is under an obligation to render to another.

39 The amounts due and payable as water use charges under the NWA would therefore constitute a debt as contemplated in Section 11 of the Prescription Act, 68 of 1969.

40 What the unreported judgement purportedly does is to distinguish between constitutional obligations and other obligations to pay an amount of money.

41 There is no rational or legal basis for doing such distinction. The effect would be that under certain factual circumstances the word “debt” has one meaning and under different factual circumstances the word “debt” would have a different meaning.

42 That would be contrary to the rule of law (requiring certainty) and the fundamental right to equality before the law enshrined in Section 9 of the *Constitution*.

43 Even if the Court was correct in the unreported judgment (which with respect it was clearly not), it should still be mentioned that even if the obligation to pay arose from Section 27 (it does not), constitutional rights are still subject to limitation in terms of a law of general application. The Prescription Act is such a law. The Eastern Cape judgment does not appear to recognize this.

44 The reliance of the Respondents on the unreported judgment is accordingly wrong. The judgment was, with respect, wrongly decided and also does not bind this Honourable Court.

SHOULD DECLARATORY RELIEF BE GRANTED?

45 There is a clear dispute that remains. One simply has to look at the letter of demand and the response thereto for the dispute to crystalize. The Applicants contend that a three year prescription period would apply to water use charges (used for commercial purposes). The Respondents differ and want to enforce the older debt, although they are unwilling to issue summons for it.

46 The dispute and harassment remains, but the Department of Water Affairs is unwilling to issue summons – likely because it is aware of the difficulties with its claims.

47 The Department simply keeps threatening and harassing the irrigation farmers without taking legal action. This now forces the hand of the Applicants to bring the application so that legal certainty can be obtained in respect of the prescription issue.

48 Clearly, the relief is not sought in the abstract. One simply has to look at the Notice of Motion and the facts presented by all individual irrigators to see this.

49 Section 21(1)(c) of the Superior Courts Act, 13 of 2010, dictates that the High Court has the power *"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*

50 The discretion should be judicially exercised and in having regard to all the relevant circumstances.

See: ***Rail Commuters Action Group v. Transnet Ltd t/a Metrorail,* 2005 (2) SA 359 (CC), at 410 D to E**

51 In ***Cordiant Trading CC v. Daimler Chrysler Financial Services (Pty) Ltd,* 2005 (6) SA 205 (SCA) at 213 E to G**, the Supreme Court of Appeal held that a two-stage approach needs to be adopted when considering declaratory relief.

52 Firstly, the Court must be satisfied that the Applicants have an interest in an existing, future or contingent right or obligation.

53 Secondly, if the Court is satisfied that an interest exists, it is then considered whether or not the order should be granted.

54 *In casu* there is a clear interest. The bulk of the Applicants are irrigation farmers themselves, on whom pressure is exerted to pay prescribed debts.

55 The First and Second Applicants are organizations representing individuals in the same position (and the public interest) and in the realization of their constitutional rights, including the right in terms of Section 34 of the Constitution to have disputes ventilated and decided in a Court.

56 It is respectfully contended that there is ample basis for granting relief and bringing legal certainty. The problem is more widespread than only the Applicants before Court.

57 Other factors of relevance will include the utility of the declaratory relief and if the grant thereof will settle the question in issue between the parties, whether there is a tangible and justifiable advantage in relation to the Applicants' position, considerations of public policy, justice and convenience, the practical significance of the order and the possible availability of other remedies.

See: ***Gensinger & Neave CC v. Minister of Mineral Resources and Energy,* 2025 (4) SA 84 (SCA), at paragraph [31]**

58 The relief sought will definitely be of significant practical assistance in deciding this legal question. It will also enable the parties to possibly have sensible settlement discussions if the true amounts and extent of payment lawfully sought is known.

59 The requested relief will definitely settle an important question between the parties since that aspect will then be *res iudicata.* It would be a simple exercise

of calculating three years back from whenever any Summons is ever possibly served.

60 There will be a tangible and justifiable advantage in that this case can settle a dispute and avoid a multiplicity of actions (if the Department ever is brave enough to institute action/s), it can also avoid having numerous judgments on essentially the same question of law.

61 It is in the interest of justice and public policy and convenience that this question is to be decided now.

62 The Respondents appear to aver that there is an alternative remedy available in raising a special plea of prescription if there ever were to be a Summons.

63 The difficulty in this regard is that Summons has never been issued for years (in fact decades). The Department simply keeps threatening and does not take legal action. The 1st and 2nd Applicants do not have accounts and for them this option is not even remotely possible.

64 If that stage were to arrive where action is instituted, it would also cause significant strain on judicial resources and cost since the issue might have to be entertained by a number of courts in a large number of matters.

65 It will normally count as an important factor that a declaratory order can lead to an issue being decided *(res iudicata)* between the parties.

See: ***Mahlangu & Another v. Minister of Defence and Military Veterans,* [2019] ZAGPPHC 418, paragraph [12]**

66 It is respectfully submitted that this case is an appropriate one to exercise any discretion and to issue the appropriate declaratory relief.

PROPER ACCOUNTING AND DUTY TO ACCOUNT:

67 It does not appear that it is disputed that there is a duty on the Respondents to render accounts or water use charges.

68 The mere fact that it is a *"use"* charge indicates that it is linked to consumption.

69 The minimal accounts that were received have been annexed to the founding papers.

70 Constantly, these invoices / statements only have vague and unsensible descriptions such as *"balances brought forward"* etc.

71 There is no proper breakdown of the date for which each respective charge is levied or any calculations. If the Department ever wanted to recover its alleged dues, it would have to prove the quantum in any event.

72 It goes without saying that proper statements will be required (with or without the prescription issue being decided) for irrigators and other commercial users to calculate their possible actual dues.

73 There has been demand for proper accounting, and again with the application and this has not been forthcoming. It is respectfully contended that an order should be granted compelling the rendering of proper accounts and invoices.

COST:

74 The First and Second Applicants litigated to protect constitutional rights of their members. The other Applicants litigated to protect their own constitutional rights.

75 It is submitted that the so-called ***Biowatch****-principle* should apply.

76 If for any reason the relief is not granted, the Applicant should not be saddled with costs.

77 If any substantive relief is granted to the Applicants, it is submitted that the Applicants would be entitled to cost. Such cost should be on Scale C.

CONCLUSION:

78 **The Applicants accordingly respectfully pray of the relief sought in the Notice of Motion, with cost on Scale C.**

ADV J.G.C. HAMMAN

Counsel for Applicants