IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2025-111881

In the matter between:

SAKELIGA NPC	First Applicant
TRANSVAAL AGRICALTURAL UNION OF SOUTH AFRICA	Second Applicant
CT VAN DER MERVE BOERDERY (PTY) LTD	Third Applicant
TWYFEL BIE 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

FIRST, SECOND AND THIRD RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Applicants seek a declaratory relief that water use charges on water use for commercial and agricultural purposes are subject to a three-year prescription period.[1]

2. For ancillary relief and in respect of the relevant Applicants, relief is sought that detailed statements of account and/or associated invoices are provided by the Respondents.[2]

3. The First, Second and Third Respondents ("the Respondents") resist the declaratory order and the ancillary relief on these grounds:

    3.1. That the Applicants failed to refer the Court to any specific debt in their founding papers and as a result, the declaratory relief is sought in an abstract.[3]

    3.2. There exists no dispute between the parties for the Court to exercise its discretion in granting a declaratory relief.[4]

    3.3. The order will not have any practical significance.[5]

4. We submit that debt arising from fundamental rights (i.e. access to water) are *sui generis* to those debts within the ambits of the Prescription Act.

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[1] Founding Affidavit, para 15.
[2] Founding Affidavit, para 17.
[3] Answering Affidavit, para 15.
[4] Answering Affidavit, para 21.
[5] Answering Affidavit, para 26.

5. At the heart of the Applicants' claim is that water use for commercial and agricultural purposes are not subject to section 27 of the Constitution. The Applicants further contend that water use charges are excluded under section 11(a)(iii)[6] of the Prescription Act and a result, the applicable prescription period for water use charges debts fall within the ambit of section 11(d) of the Prescription Act. This is untenable as this was not substantiated by the Applicants.

6. We further submit that water use charges play a significant role in funding direct and related costs of water resource management and in the Department's goal to achieve an equitable and efficient allocation of water.[7]

7. What is sought by the Applicants is untenable in that the ultimate aim of water resource management is to achieve sustainable use of water for the benefit of all users.[8] The Applicants' claim works against this.

OBJECTIVES OF THE NATIONAL WATER ACT ("NWA")

8. The NWA is the primary legislation regulating the use of water in South Africa. In terms thereof a person may only use water as part of Schedule 1 domestic basic uses, or as continuation of an existing lawful water use under section 34 of the

[6] Section 11: The periods of prescription of debts shall be the following: (a) thirty years in respect of - (iii) any debt in respect of any taxation imposed or levied by or under any law.
[7] Answering Affidavit, para 26.
[8] See the Preamble of the National Water Act 36 of 1998.

NWA, or under a licence issued in terms of the NWA or finally under a general authorisation.[9]

9. Section 3 of the NWA bestows a mandate on the Minister as a trustee of the nation's water resources to ensure 'that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.'

10. Section 3(2) provides further that the Minister 'is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.'

11. Lastly to enable the effective exercise of the mandate in sections 3(1) and (2) as well as the objects in section 2 of the NWA, section 3(3) gives the Minister and only the Minister, 'the power to regulate the use, flow and control of all water in the Republic.'

12. We submit in this regard that the objective of the NWA is not discriminatory of water use for commercial and agricultural or domestic purposes. NWA is concerned with ensuring that water is allocated equitably and used beneficially in the public interest.

13. Interestingly, whereas the Applicants strongly argue that section 27 is not applicable to water use for commercial and agricultural. This is not what is

[9] Section 4 read with section 22(1) NWA.

envisaged in NWA. Section 3 of the NWA provides the Respondents must ensure that 'that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.'

14. NWA dictates that the nation's water must benefit of all persons and this Respondents' obligation is in terms of the constitutional mandate.

15. We further submit whereas that the NWA centres its beneficiaries as '*persons'*, this description is wide as it includes the Applicants as guidance is provides in section 1 which defines persons to include a '*natural person, a juristic person, an unincorporated body, an association, an organ of state and the Minister.'*

16. Any conflict arising from the purpose of section 27(1) that it is only applicable to water use for domestic purposes, is with respect incorrect in that commercial irrigation farmers are also the beneficiaries of the objects of the NWA.

17. We submit that subjecting water use charges to prescription goes against the objectives of the NWA and against the funding of the water resource management for the benefit of all persons.

18. We submit that should the Applicants' relief be granted, then in such circumstances, those relying on the continuous funding of the water resource management will not enjoy their fundamental section 27(1)(b) right and will hamstring the Respondents to achieve what is envisaged in the NWA to achieve the sustainable use of water for the benefit of all users.

THE LAW APPLICABLE TO DECLARATORY ORDERS

19. Under common law, the High Court did not have jurisdiction to grant declaratory relief.[10] Such power was conferred upon the High Court by the provisions of section 102 of the General Law Amendment Act 46 of 1935 (Currently it is governed by section 21 of the Superior Courts Act 10 of 2013).

20. In terms of the provision of Section 21(1)(c) of the Superior Courts Act, 10 of 2013, the High Court may grant a declaratory order without any consequential relief sought. The section provides as follows:

> *"21(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offence triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –*
> *(a) … …*
> *(b) … …*
> *(c) 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"*

21. In ***Durban City Council v Association of Building Societies***[11] and confirmed in ***Cordiant Trading CC v Daimier Chrysler Financial Services (Pty) Ltd***[12] it

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10 *Geldenhuys and Neethling v Beuthin* 1918 AD 426.
11 1942 AD 27 at 32
12 2005 (6) SA 205 SCA at para 15 – 17

was held that the exercise of the Court's discretion in terms of Section 21(1)(c) follows a two legged enquiry and that being that:

21.1. The Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so

21.2. The Court must decide whether the case is a proper one for the exercise of its discretion.

22. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly does it proceed to the second leg of the enquiry.[13]

23. Herbstein and Van Winsen[14] extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively and/or negatively in an application for declaratory relief. This includes:

23.1. The existence and/or absence of a dispute;

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13 ***Minister of Finance v Oakbay Investment (Pty) Ltd and Others 2018(3) SA 511***, para 53

14 Herbstein and Van Winsen: The Civil Practice of the High Courts & Supreme Court of Appeal of South Africa

23.2. The utility of declaratory relief;

23.3. Whether if granted, it will settle the question in issue between the parties;

23.4. Whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;

23.5. Consideration of public policy, justice and convenience;

23.6. The practical significance of the order; and

23.7. The availability of other remedies.

24. ***Ex-parte Nell***[15] settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by abrogating this requirement.

25. *However,* ***Ex Parte*** *Nell did not render declaratory orders justified in all cases where there is no live dispute. In fact in Minister of Finance v Oakbay Investment (Pty) Ltd and Others[16], the Court held that the dictum of this requirement in Ex Parte Nell is not without qualification[17]. The Court went further to state that the following extract from the judgment reflects the reason why the Court granted the declaratory relief even though there was no live dispute between the parties:*

"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and <u>where an uncertain legal position (our own emphasis)</u>

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15 1963 (1) SA 754 (A)
16 2018(3) SA 515 (D)
17 Para 61.

could be contested by all or one of them. It is more practical and the interests of all are better served if the legal question can be laid before a Court even without there being an already existing dispute[18]."

26. *With reference to the dictum **in Ex-parte Nell**, the Court concluded that:*

"Therefore post Ex Parte Nell, the absence of a live dispute remains a factor to be considered where the legal position to be determined is uncertain. As stated previously, the legal position regarding the question the Minister seeks determined has been decided previously. The Oakbay Group does not contest this. Unlike the scenario in Ex Parte Nell, there is no uncertainty between the parties regarding its terms or its application. To the extent that in Ex Parte Nell the Court dealt with 'an uncertain legal position which could be contested', that case is distinguishable from the present one[19]."

27. *The Court then proceeded at paragraph 63 to hold as follows:*

"The absence of a controversy in casu, regarding the relevant legal position cannot be ignored. In the circumstances of this case, the Court considers the absence of legal uncertainty to be a significant factor in determining the direction in which the Court ought to exercise its discretion. This factor carries other ramifications that have a bearing on the exercise of the Court's discretion. The Court does not provide legal advice to the parties. Courts therefore, consider it inappropriate for

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18 Para 61.
19 Para 62.

any party to come to Court for the confirmation of a legal question which is common cause between the parties[20]*."*

28. *At paragraph 64 of* ***the Oakbay*** *judgment, the Court further concluded that:*

"Lack of controversy on the legal question the Minister sought determined also brings into question the utility of the declaratory relief, its practical effect and the advantage the applicant will enjoy if the declaratory relief is granted."

29. ***In JT Publishing (Pty) Ltd and Another v Minister of Safety and Security***[21]*, the Constitutional Court held as follows:*

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the

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20 Para 63.

21 1997 (3) SA 514 CC, approved in ***Director-General: Department of Home Affairs and Another v Mukhamadiva*** 2014 (3) BCLR 306 CC

remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here."

30. The Sixth Respondents disputes that the Applicant falls within the first leg of the enquiry, i.e., that the Applicants are persons interested on existing, future or contingent right. There exist no dispute pertaining to the applicants' existing, future or contingent right.

31. The correct approach to section 21(1)(c), the wording of which is similar to the erstwhile power conferred upon the court under section 10(1)(a)(iii) of the now repealed Supreme Court Act 58 of 1959, was summed up **by Corbett CJ *in Shoba v OC, Temporary Police Camp, Wagendrift Dam***[22] as follows:

"An existing or concrete dispute between persons is not a pre-requisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see Ex parte Nell 1963 (1) SA 754 (A), at 759H - 760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell's case, at 760B - C). In Nell's case, supra, at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27, fit 32, with reference to the identically worded sec 102 of Act 46 of 1935:
"The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is

[22] 1995 (4) SA 1 (AD) at 29.

a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, this Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

32. The Supreme Court of appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[23] confirmed the two-stage approach adopted by the then Appellate Division in *Durban City Council v Association of Building Societies*[24] and held that:

> *"…, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."*

33. When considering the grant of declaratory relief, the court will not grant such order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute.[25]

34. It is trite that it is not the role of courts to provide legal advice.[26] For this reason, it is not competent for a court to consider an application for declaratory relief in

[23] 2005 (6) SA 205 (SCA) at para 18.
[24] 942 AD 27 at 32.
[25] *Ex parte Noriskin* 1962 (1) SA 856 (D).
[26] *Ex Parte Nell* 1963 (1) SA 754 (A)) at 760B.

respect of a matter that is abstract or of academic interest. They must satisfy the court that their interest pertains to the legal right or obligation to which the order will relate.[27]

35. The Applicants claim to bring the application in their own interest and in the public interest in terms of section 38 of the Constitution.[28] However, simply because the Applicants have interest and require legal certainty on the prescription of water use charges[29] does not mean it has the type of interest necessary to render the declaratory competent.

36. We submit that the critical question is what right or obligation of the Applicants or simply the commercial irrigation farmers is implicated? It is not in dispute that the Applicants or any of the commercial irrigation farmers are not facing any legal challenges from the Respondents.

37. What is contended by the Applicants is that they are subjected to harassment and threats by collecting agents in the employ of the Respondents. Secondly, the Applicants contend that they are in need of legal certainty with this question and the Court must decide on this. Other than the Applicant failing to put factual allegations before the Honourable Court that justifies the exercise of the courts' discretion in granting the declaratory relief,[30] this approach is untenable.

[27] *Preston v Vredendal Co-operative Winery Ltd and Another* 2001 (1) SA 244 (ECD) at 249 A-D.
[28] Founding Affidavit, para 32.
[29] See Founding Affidavit, para 30.
[30] See Answering Affidavit, para 15.

38. We submit that there are difficulties with the Applicants' approach in the application for these reasons:

38.1. Firstly, there is a legal certainty as adopted in *Njongi v MEC, Department of Welfare, Eastern Cape,*[31] that constitutional obligations such as those borne by the Respondents are not debts and as such, they do not prescribe.

38.2. Even if the Applicants argues that *Amathole* was incorrectly decided and is not binding,[32] what is important from the judgment is that it relied on *Njongi* which was clear that constitutional obligations are not debts and as such, they do not prescribe.

38.3. The other challenge which the Applicants are facing is to distinguish between provisions of water for commercial farmers and households. NWA is clear that the Respondents are entrusted with managing and controlling water in a sustainable and equitable manner for the benefit of all persons and in accordance with its constitutional mandate. Commercial irrigation farmers are not excluded from *'persons'* in terms of section 1 of the NWA.

38.4. It is evident that the legislature considered the commercial irrigation farmers as persons to benefit from the water resource management and

[31] [2008] ZAAC 4; 2008(4) SA 237 4(CC) at paragraph 42.
[32] See paragraphs 43 and 44 of the Applicants' Heads of Argument.

must contribute to the funding of it and as such, funding for water resource management is not susceptible to prescription.

38.5. The attack on the Respondents' reliance on section 27 of the Constitution is not assisting the Applicants. They rely on *Mazibuko,*[33] which was concerned with access to water and not working against the funding of the water resource management. The importance of *Mazibuko* comes when there is a well-funded water resource management for the benefit of households, commercial irrigation farmers and other users.

38.6. In their own words, the Applicants accept that they deliberately left paying water use charges for it to prescribe. In fact, they concede in many ways that they continued to work against the funding of the water resource management for more than three years without a plausible explanation.[34] If there is, the Applicants created this artificial legal uncertainty to be exempted from paying the water use charges and to continue frustrating the Respondents in delivering their constitutional mandate.

38.7. What the Applicants want to achieve is not legal certainty, which we submit already exists, but rather a different legal certainty. Essentially, the Applicants' abuse for declaratory relief is an attempt to get the Court to grant the relief sought not supported by any factual allegations and

[33] See paragraph 30 of the Applicants' Heads of Argument.
[34] Answering Affidavit, para 68.

where no dispute exists between the parties.[35] This is not a permissible basis on which to engage a court's power to grant declaratory relief.

38.8. Secondly, what is even more worrying is that this application is an attempt by the Applicants to achieve a legislative purpose through the guise of interpretation.[36]

38.9. The Applicants in their interpretative exercise ignore that the old NWA's had no constitutional mandate which is the cornerstone of the new NWA and that water user charges are subjected to the Prescription Act.

38.10. We submit that the legislature did not envisage that the water use charges would be susceptible to prescription as its function is akin to an obligation to address the funding of the water resource management for the realisation of the fundamental section 27 right.[37] If this was envisaged, the drafters of the NWA would have dealt with it.

38.11. Even if the fundamental section 27(1)(b) right was not connected to the water use charges as argued by the Applicants, this does not mean that it would be competent for the Honourable Court to harness its power to grant declaratory relief to:

38.11.1. absolve the Applicants from paying their water use charges they ignored for years to argue prescription;

[35] Answering Affidavit, para 22 and 23.
[36] See Founding Affidavit, paragraphs 40 to 46.
[37] Answering Affidavit, para 55.

38.11.2. to grant the relief sought where there is no live controversy between the parties; and

38.11.3. to grant the relief sought where there are no factual basis or allegations supporting the relief.

39. We further submit that the declaratory relief sought by the Applicants is untenable, this is particularly so given that the declaratory relief is sought in broad terms. Despite the Applicants failing to refer the court to any specific debt and using the umbrella approach, if this relief is granted, it will open a flood gate of those who ignores paying their water use charges. It will also disturb the default position as legislated in the preamble of the NWA.

40. In addition, what is sought by the Applicants is wholly inappropriate for a Court to usurp the Respondents' powers in terms of the premeable of the NWA to ensure that the water resource management is well-funded. The relief sought blurs the line between judicial and executive powers.

41. It is a well-established and uniformly observed policy that courts should not exercise their discretionary power to grant declaratory relief in favour of deciding points that are merely academic, abstract, or hypothetical.[38]

42. Abstract legal challenges are generally treated with disfavour by courts, which are reluctant to "peer into the future" to determine academic, hypothetical or

[38] *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and Constitutional Development* (1018/2024) ZASCA 181 (01 December 2025) para 22.

speculative issues when doing so may necessitate predicting facts and legal problems that may not arise or that have not arisen.[39]

43. In this matter, we submit that the Court is not obliged to deal with the relief sought even when the Court is capable.[40] Evidently, the relief sought by the Applicants is hypothetical or abstract as it is not tied to any factual allegations.[41] On the contrary, the Applicants denies that the relief sought is in the abstract.[42]

44. The Applicants contend that one need to simply look at the Notice of Motion, various Applicants' accounts, enforcement efforts against for factual allegations. In the Notice of Motion, various account are itemised and in the Founding Affidavit, statements are annexed. This is not assisting the Applicants' case in that the question whether or not the debt has prescribed depends on the facts of each case. Lumping all these accounts together defeats the principle of considering each debt on its own facts. Prescription of a debt cannot be pronounced in abstract.[43]

45. In *Lawyers for Human Rights*,[44] it was held that the factors set out in *Ferreira* in relation to public interest standing are of relevance even where there is no live controversy and where the challenge is an abstract one:

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[39] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5. 2014 (1) SACR 545 (CC); 2014 (5) SA 317; 2014 (5) BCLR 606 (CC) at para 13.
[40] *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 at 525A-B.
[41] Answering Affidavit, para 15.
[42] Replying Affidavit, para 17.
[43] Answering Affidavit, para 24.
[44] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 18.

"It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."

46. At this stage, as there is no live controversy between the parties and that the Applicants' challenge is an abstract one, it is contended that there is no right infringed and if such right exists, it is artificial in that the Applicants admit that they ignored settling the debts for years to raise prescribe.

47. Lastly, we submit that the facts of the matter militates against the exercise of the Court's discretion in favour of Applicants' case and granting the declaratory relief sought.

ORDER TO FURNISH THE APPLICANTS WITH COMPLETE ITEMISED STATEMENTS

48. Prayer 3 of the Notice of Motion deals with ordering the Respondents to furnish the Applicants with complete itemized statements together with all the relevant invoices.

49. In support of this order, the Applicants argue that *"it, however, becomes clear that the general approach is to also claim prescribed debt (older than 3 years) from them. This is the position in respect of all of the third and further applicants."*

50. We submit that these allegations are not supported by any facts for the following reasons:

50.1. These allegations emanates from annexure 'FA14' which only stipulates the amount owed and not the date the debt was due.

50.2. In any event where there was ambiguity on the correspondences or statements from the Respondents or the collecting agents, it was incumbent upon the Applicants to seek clarity from Respondents or the collecting agents.[45] This was not done, in fact, the Applicants for the first time raised this in the court papers.

50.3. In their own admission, the Applicants or some of them were furnished with statements in 2019[46] and ignored settling the debt to wait for almost six (6) years to raise prescription and demand an order to be furnished with complete itemized statement.

51. In opposing this relief, we submit that the Applicants failed to give reasons why the court should order the Respondents to provide the Applicants with the statements of accounts as opposed to the Applicants requesting the statements directly from the Respondents.[47] In contrast,[48] the Applicants argues that they placed necessary factual allegation before Court. That detailed statements and invoices were requested on numerous occasions and that the Respiondents

[45] Answering Affidavit, para 79.
[46] See paragraph 82 and 83 of the Founding Affidavit.
[47] Answering Affidavit, para 43.
[48] See para 24 of the Replying Affidavit.

failed to place such complete statements before court. This approach is fatal for these reasons:

51.1. The onus is for the Applicants to establish that the Respondents refused and/or ignored requests to furnish complete statements.

51.2. Even in their replying affidavit, the Applicants failed to annex correspondences requesting detailed complete statements from the Respondents. This is despite the principle that a litigant makes their case in the founding papers.

52. What is sought by the Applicants in prayer 3 is for the court to engage in departmental administrative function and the court should refuse this invite.[49]

53. Lastly, we contend that furnishing the Applicants with detailed/complete itemised statements lies with the Minister or the Department and not the courts. As a result, the order sought is an abuse of court processes and on this basis alone, the application must be dismissed with punitive costs.[50]

SECTION 27 OF THE CONSTITUTION VERSUS THE PROVISIONS OF NWA

54. The Applicants argues that their case is not connected to any of the provisions of section 27 of the Constitution in that:

[49] Answering Affidavit, para 44.
[50] Answering Affidavit, para 79.

54.1. *'Water'* envisaged in section 27 of the Constitution would be portable water used for basic human necessities and sanitation.

54.2. There is no constitutional right for everyone to have access to irrigation water.[51]

54.3. No water use authorisation is required to use water for normal household purposes.[52]

54.4. *Mazibuko* was clear that Section 27 only caters for water used for basic necessities of life.

54.5. Water use entitlements for irrigation are statutory rights.

55. What is clearly confusing about the Applicants' argument is that '*The NWA has its origins in Section 25(8)[53] of the Constitution and is not Section 27 legislation (providing access to potable water).'* This is not supported by any authority.

56. Despite section 25(8) concerned with property rights that the state may use the legislative and other measures to achieve land, water and related reforms to redress the past, the Applicants elected to wrongly rely on section 25(8) to suit their narrative.

[51] See para 28 of the Applicants' Heads of Argument.
[52] Section 4 of the NWA read with Schedule 1.
[53] No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

57. Even if the interpretation and reliance on section 25(8) was found to be correct, we submit that the Respondents argument is as follows:

57.1. NWA bestows a mandate on the Respondents to manage and control the nation's water resource in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

57.2. NWA is not discriminatory of water use for commercial and agricultural or domestic purposes. NWA is concerned with ensuring that water is allocated equitably and used beneficially in the public interest in accordance with its constitutional mandate.

57.3. Section 1 of the NWA is explicit that *'persons'* who benefit from the managed and controlled nation's water resource includes household beneficiaries and commercial irrigation farmers such as the Applicants.

57.4. That it is incorrect to link the NWA to the property clause (especially section 25(8)) when section 27(1)(b) provides for the access or provision of water.

57.5. That the rights in section 25(8) and section 27(1)(b) are not competing rights as they cater for different provisions.

57.6. Lastly, we contend that the Applicants' case is as pleaded concerned with prescription of water use charges and not property rights on land and water.[54]

58. In dealing with the purpose of the property clause and especially the provision of section 25(8), we submit that this section was incorrectly relied upon by the Applicants in that the property clause is concerned with the protection for the holding of property rights.[55]

59. Section 25(1) must be construed in the context of the other provisions of section 25 and in the context of the Constitution as a whole.[56] Whilst section 25(4) to 25(9) underlie the need for the redress and transformation of the legacy of grossly unequal distribution of land in the country.[57]

60. The purpose of section 25 of the Constitution is to protect private property rights and to serve the public interest, mainly in the sphere of land reform but not limited thereto.[58]

61. We submit that the purpose of section 25(8) is incorrectly construed by the Applicants as held in *First National Bank* and the *Certification* case. Secondly,

[54] The Applicants relied on section 25(8) for the first time in para 32 of their Heads of Argument.
[55] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC); (1996) 17 ILJ 821 (CC) (6 September 1996) para 72.
[56] *Haffejee NO and Others v eThekwini Municipality and Others* (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) (25 August 2011) para 30.
[57] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); 64 SATC 471 (16 May 2002) para 49.
[58] *First National Bank* above n 44 at para 50.

the Applicants failed to justify the reasons why there is link between section 27(1)(b) and the NWA.

62. Other than the Applicants' incorrect construction of the purpose of section 25 and its provisions, there are other worrying aspects of the Applicants' contentions in this matter. It appears from the case pleaded by the Applicants that the nation's water resource managed and controlled by the Respondents is not the water source for private irrigators and that not everyone has a right to have access to irrigation water.[59]

63. We submit that an inference must be drawn from these allegations[60] that the Applicants deliberately ignored and/or refuse to settle their water use charge debts believing that they are exempted from funding the nation's water resource.[61]

64. In addition, as a result of the Applicants neglecting to pay the usage of water consumed from the nation's water resource must be seen as unjustified enrichment.[62]

65. The Applicants contend that the Prescription Act limits the rights in section 27 of the Constitution. This will not get the Applicants' case of the ground as the

[59] See paragraph 21.3 and 21.6 of the Replying Affidavit.
[60] Para 21.3 – "……. *the fact that the state may have certain obligations in terms of the sections of the Constitution, find no application to the current case and does not affect the position of the private irrigators*." And para 21.6 – "*everyone certainly does not have the right to access to irrigation water*."
[61] See para 68 of Answering Affidavit.
[62] See para 69 of Answering Affidavit.

Applicants failed to make a case for the limitation of this right and why such limitation is justified.[63]

66. If the Applicants' argument that the Prescription Act limits the rights in section 27 of the Constitution, next is to consider the interests of the private irrigators to the entire population who are beneficiaries of the nation's water resource. The Applicants failed to engage in this exercise as it is detrimental to their case.

67. By focusing on the needs of the beneficiaries in terms of section 27, the needs of the private irrigators who refuse and/or ignore to fund the nation's water resource management becomes secondary in the event that there are many other private irrigators who continue to pay for the water they use in their commercial farming activities.

68. Lastly, it is submitted that the preamble of the NWA is concerned with the Respondents delivering on their constitutional mandate and clearly the NWA is concerned with fundamental rights inclusive of those rights in section 27 of the Constitution.

SEPERATION OF POWERS

69. Should the Honourable Court grant the relief sought, the intended purpose or objectives of the NWA would be disrupted tremendously. Put the other way, the Respondents would be impeded in their mandate to ensure that the water

[63] See para 43 of the Applicants' Heads of Argument.

resource is well funded and that the constitutional mandate entrusted on the Respondent is achieved.

70. This likely scenario, we submit with respect, is in conflict of the provisions of section 27(2) of the Constitution that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of rights in section 27(1).

71. In ***Zondi v MEC for Traditional and Local Government Affairs and Others***,[64] the Court warned of the need for courts to keep in mind the principle of separation of powers. The Court held:

"This Court has previously delineated the principles that should guide it in deciding whether words should be severed from a provision or read into one. In the first place, there are two primary considerations to be kept in mind: the need to afford appropriate relief to successful litigants, on the one hand, and the need to respect separation of powers and, in particular, the role of the Legislature as the institution that is entrusted with the task of enacting legislation, on the other. In the second place, the provision which results from severance or reading words into the statute should interfere with the laws adopted by the Legislature as little as possible. What is required therefore is for a court to endeavour to be as faithful as possible to
the legislative scheme within the constraints of the Constitution."

72. In the light of the above, it is the role of the legislature to enact legislation and the NWA and its regulations regulate the relationship between water users and the Respondents.

[64] 2005 (3) SA 589 (CC).

WHY SHOULD THE DECLARATORY ORDER AND ANCILIARY RELIEF BE REFUSED?

73. We submit that no specific debt is referred to in the founding papers and as a result the declaratory relief sought is sought in an abstract.

74. In this case, the Honourable Court is requested the declare that prescription Act applies to the water charges, notwithstanding the fact that the Honourable Court is not provided with factual allegations to exercise its judicial discretion in favour of granting the declaratory order sought.

75. We further submit that there is no live controversy between the parties for the court to grant a declaratory order sought. In the absence of ensuing litigation, it cannot be said that there exists a dispute in so far as the alleged recovery of prescribed debt is concerned.

76. The Applicants failed to provide a plausible explanation or reasons for failing to approach the Respondents for detailed itemized statements and why this Honourable Court must be engaged in departmental administrative functions.

77. It is evident that the Applicants failed to construe the object of section 25(8) of the Constitution and as a result, abused the processes of this court for a meritless case.

78. There are other available remedies to the Applicants upon served with the summons to raise a special plea of prescription.[65]

79. Considering the preceding paragraphs, we submit that the Applicants failed to meet the minimum threshold for a declaratory order to be granted in their favour. This application should fail with punitive costs.

COSTS

80. On costs, the Applicants launched this application to be absolved from settling the water use charges they ignored and/or refused to pay for years. Despite having access to the Respondents or its collecting agencies, the Applicants failed to request clarity or detailed itemized statements as alleged.

81. The Applicants are not in court to protect their constitutional rights but to abuse the processes to engage this court in an abstract or academic exercise. Even when the Applicants were warned in the Respondents' opposing papers that there is no live controversy between the parties, they persisted with this application.

82. We submit that Biowatch principle should not shield the Applicants in this case and that they must be mulcted with a punitive costs order.

CONCLUSION

[65] Answering Affidavit, para 87.6.

83. In light of what is set out above, this application stands to be dismissed with punitive costs on an attorney client scale and that such costs must include the costs of two counsel, where so employed.

Adv Happy Mpshe
Adv Ntsako Baloyi
Counsel for the Respondents
CHAMBERS
PRETORIA & POLOKWANE
2 August 2026

LIST OF AUTHORITIES

1. *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC); (1996) 17 ILJ 821 (CC) (6 September 1996).

2. *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).

3. *Durban City Council v Association of Building Societies* 942 AD 27.

4. *Ex Parte Nell* 1963 (1) SA 754 (A)) at 760B.

5. *Ex parte Noriskin* 1962 (1) SA 856 (D).

6. *Geldenhuys and Neethling v Beuthin* 1918 AD 426.

7. *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC); 64 SATC 471 (16 May 2002).

8. *Haffejee NO and Others v eThekwini Municipality and Others* (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) (25 August 2011).

9. *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514.

10. *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

11. *LexisNexis South Africa (Pty) Ltd v The Minister of Justice and Constitutional Development* (1018/2024) ZASCA 181 (01 December 2025).

12. *Preston v Vredendal Co-operative Winery Ltd and Another* 2001 (1) SA 244 (ECD) at 249 A-D.

13. *Savoi v National Director of Public Prosecutions* [2014] ZACC 5. 2014 (1) SACR 545 (CC); 2014 (5) SA 317; 2014 (5) BCLR 606 (CC).

14. *Shoba v OC, Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (AD).

15. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC).