IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 2174/2021

In the matter between:

BETHULIE WATER FORUM	1st Applicant
GARIEPDAM BELANSTINGBETALERS VEREENIGING	2nd Applicant

and

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BLOEMWATER	1st Respondent
KOPANONG LOCAL MUNICIPALITY	2nd Respondent
PREMIER OF THE FREE STATE	3rd Respondent
MINISTER OF WATER AFFAIRS AND SANITATION	4TH Respondent

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **26 AUGUST 2021**

DELIVERED ON: **3 DECEMBER 2021**

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[1] The applicants seek an interim order to interdict the First respondent (Bloemwater) from imposing restrictions on the bulk water supply to the second respondent (the Municipality) in terms of s4(5) of the Water Services Act, 108 of 1997 (the WSA), pending the finalisation of an application to be brought challenging the constitutionality of s4(5) of the WSA, unless:

a) Bloemwater has formally in writing requested the fourth respondent (the Minister) to intervene in terms of section 63 of the WSA and a period of 30 days has lapsed since such request;

b) Such intervention has run its course, as prescribed in s63 of the WSA, or the Minister has failed and/ refused to intervene within that 30-day period; and

c) Where the contemplated restriction or discontinuation is motivated by non-payment by the Municipality or the lack of funds or other resources for Bloemwater to provide a full supply of bulk water to the Municipality, Bloemwater has applied to the Minister for funding in terms of sections 64,65/or 66 of the WSA, and a period of 30 days has lapsed since the application; and

d) The Minister has failed and /or refused to grant the application for funding within 30 days; and

e) After exhaustion of the remedies referred to in paragraphs (a) and (d) above, Bloemwater has, in addition to its other obligations in terms of section 4(5) of the WSA where it applies, also at least 30 calendar days prior to any proposed restriction and/or discontinuation, published or caused to be published on Bloemwater website and at least two major newspapers circulating in all the areas that may be affected by the restriction and/or discontinuation, a prominent notice setting out:

    i) The date of the commencement and termination of the restriction and/or discontinuation;

    ii) The conditions for the earlier termination of the restriction and /or discontinuation;

    iii) The extent of any intended restriction and its expected impact on the availability of water within all affected areas;

iv) The reasons for the restriction and/or discontinuation, where the restriction is motivated by the Municipality's debt to Bloemwater-

a) The nature and extent of the alleged debt giving rise to the restriction and/or discontinuation; and

b) Comprehensive details of steps taken to address the alleged debt;

THE FACTS IN BRIEF

[2] Both applicants are voluntary associations. The first applicant has one of its aims to address failures in the delivery of services in the Municipality of Bethulie. The second applicant is a non-political organisation which aims to safeguard the interests of residents' rate-payers at Gariepdam.

[3] Bloemwater, a water services institution in terms of the WSA, provides bulk water supply to the Municipality against payment in terms of the Water Services Agreement. The Municipality in turn also provides the water it receives from Bloemwater to the residents, who are end-users, within its area of jurisdiction against payment. The residents include the members of the applicants.

[4] It is the version of the applicants that since 2016 Bloemwater has on several occasions limited the bulk water supply to the Municipality due to non-payment. According to the applicants the current bulk water supply is limited to 50% of full supply.

[5] On the version of the applicants, these bulk water limitations impact severely on their members and residents. It is the case for the applicants that some community members experienced reduced water pressure while others complain of having water

only some hours of the day or week. Other residents had no water at all.

[6] On 15 April 2021 Bloemwater issued a notice in terms of s4(5) of the WSA notifying the Municipality, the Minister and the Free State Provincial Government of its intention to limit bulk water supply due to the Municipality's non-payment of its bulk water account with Bloemwater. This prompted this application.

[7] The application is opposed on the following grounds:

a) That the applicants seek relief that will effectively amend section 4(5) of the WSA, which relief is incompetent;
b) That the applicants failed to establish the requirements for the interim interdict they seek.

[8] Section 4(3) of the WSA provides as follows:

"Procedure for the limitation or discontinuation of water services must-

a) be fair and equitable;
b) Provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless-
    (i) other consumers would be prejudiced;
    (ii) there is an emergency situation; or
    (iii) the consumer has interfered with a limited or discontinued service; and

(c) not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services."

[9] Section 4(5) on the other hand provides:

"Where one water services institution provides water services to another water services institution, it may not limit or discontinue those services for reasons of non-payment, unless it has given at least 30 days' notice or 60 days' notice in writing of its intention to discontinue those water services to-

(a) the other services institution;

(b) The relevant Province; and

(c) The Minister."

[10] On 13 May 2021 the applicants issued an urgent application against the respondents. The matter was set down for hearing on 14 May 2021.The purpose of the application and the case the respondents were called upon to answer was in a nutshell set out as follows in the founding affidavit:

"*16. The purpose of this application is:*

16.1 to prevent Bloemwater from introducing on 14 May 2021 or thereafter the further restriction on the bulk water supply to KLM (the Municipality) in terms of section 4(5) of the WSA that it has given notice of to the second respondent and our attorneys by letter dated 15 April 2021….;

16.2 to prevent Bloem Water from introducing any further restriction on or discontinuation of bulk water supply to KLM, whether in terms section 4(5) of the WSA or for any other reason apart from necessary repairs or maintenance unless it has exhausted the remedies at its disposal in the WSA to resolve any dispute between it and KLM that give rise to its intention to restrict or discontinue supply and has given adequate advance to all residents of KLM of its intention to restrict or discontinue bulk supply; and in this way to;

6.3 protect our members against any further restriction of their access to water, beyond what is already in place and so protect their constitutional right to have access to water beyond to sufficient water against further and additional breach."

[11] Before dealing with the first issue for adjudication, it is necessary to refer to the purpose of pleadings in general. It is trite that the purpose of pleadings is to define the issues and further to inform both the court and the opposite party what case he has to meet.[1]

[12] From the amended notice of motion, it is clear that the applicants seek to interdict Bloemwater from exercising its statutorily conferred powers as set out in s4(5) of the WSA in its current form pending a constitutional challenge to be brought later in respect of the said provision. The applicants further seek this court to require Bloemwater to comply with other further conditions before it can limit any bulk water supply over and above what is expected of it in terms of s4(5). In the Heads of Argument and the submissions before me, on behalf of the applicants, arguments were made regarding the unconstitutionality of s4(5) and I was urged to grant this interdict pending an application to be brought to declare s4(5) unconstitutional.

[13] It is submitted in the Heads of Argument that *"to the extent that section 4(5) authorises the limitation of the rights to have access to sufficient water and to equitable service delivery without requiring recourse first to this plethora of less restrictive means to achieve its purpose, it enables disproportionate and so unreasonable and unjustifiable limitation of those rights. Decisions taken in terms of section 4(5) without first having recourse to these alternative avenues or remedies would likewise be unconstitutional and unlawful".*

[1] Minister of Safety and Security 2010(2) SA 474 para 11; Niewoudt 1988(2) All SA 189(SE) 194.

[14] Save for reference to the unconstitutionality of s4(5) in the amended notice of motion and the intention to approach this court to declare the said section unconstitutional, the attack on the impugned section is only made in the Heads of Argument. This, however, does not assist the applicants as one would have expected them to have dealt with the reason to seek the interdict in order to bring an application to declare the impugned section unconstitutional, in the founding affidavit. It is trite that the applicants must make out their case in the founding affidavit and not in the Heads of Argument. It is trite that all necessary allegations upon which the applicants rely must be contained in the founding affidavit.[2]

[15] In the founding affidavit it is not the case of the applicants that the reason to seek this interdict is to allow them a temporary order to give them time to approach the court to declare s4(5) unconstitutional. While the applicants have shifted the goal posts from seeking a final order in the amended notice of motion, and now seek an interim order, it is clear from the language of the pleadings and the purpose of the application as set out in paragraph 10 above that the applicants still seek a final order. The pleadings were not supplemented or amended upon seeking an interim order to be in line with the amendment of the notice of motion. Simply put, the pleadings do not talk to the amended notice of motion. The respondents were called upon to answer a case of restraining Bloemwater from limiting or discontinuing the supply of bulk water pursuant to the issue of the notice of 15 April 2021. They(respondents) were not called upon to answer the case of a temporary restraining order to interdict Bloemwater from

[2] Brayton Carlswald v Brews 2017(5) SA 498(SCA); Mostert v First Rand Bank 2018(40 SA 443(SCA) para 13.

limiting the bulk water supply pending an application to be brought to declare s4(5) unconstitutional. No reference is made in the founding affidavit about the unconstitutionality of s4(5). As indicated above, reference to any unconstitutionality appears in the arguments. The Applicants filed a supplementary affidavit with leave of this court. That affidavit also dealt with the challenges the applicants had in resolving the water issue. It is impermissible to direct a party to a particular direction in pleadings only to take a different direction in arguments and submissions.

[16] The relief sought goes to the heart of the doctrine of separation of powers. The said relief requires this court to restrain Bloemwater from exercising the powers it derives from the WSA. In my view the applicants must set out the grounds they intend to raise in the later application to declare the impugned section unconstitutional in order for this court to have a prima facie view of them. It is in my view not enough for the applicants to seek an interdict by simply alleging that it intends to bring a constitutional attack sometime in the future. Such a vague reason cannot suffice to grant a temporary interdict. Even if the application for declaration of unconstitutionality is not yet before court, the respondents also, as interested parties have the right to interrogate the assertions made. The remarks in *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*[3] are in my view instructive although I must accept that we are at the restraining order stage. The court said:

"[95] The respondents did not plead, or in any event properly plead, the constitutional attack that was upheld by the high court. Constitutional questions ought to be approached by litigants and courts alike with the

[3] (538/2020) [ZASCA] 95 (1 July 2021).

appropriate degree of care. The Constitutional Court has repeatedly warned that constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so. Ngcobo J put the preposition as follows: 'Parties who challenge the constitutionality of a provision in a statue must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the issue of justification. I would emphasise that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statue only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and relief that is sought.''

"[96] In Public Servants Association obo Ubogu v Head of Department of Health, Gauteng and Others, the Constitutional Court spoke thus: 'In Garvas, Jafta J (albeit the minority) emphasised the importance of accuracy in the pleadings. He remarked:

"Orders of constitutional invalidity have a reach that extends beyond the parties to a case where a claim for the declaration of invalidity is made. But more importantly these orders intrude, albeit in a constitutionally permissible manner, into the domain of the legislature. The granting of these orders is a serious matter and they should be issued only where the requirements of the Constitution for a review of the exercise of legislative powers have been met.

Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

[17] It is admitted, that at this stage the question of the unconstitutionality of s4(5) is not an issue but in my view, it is a relevant factor to be taken into account in the determination of whether to grant an interdict or not. Failure to deal with it in the founding affidavit will affect the case for the applicants negatively.

[18] In order to limit the bulk water supply by reason of non-payment, Bloemwater must first issue the prescribed notice as envisaged in s4(5) of the WSA to the Municipality, the Free State Provincial Government and the Minister. Save for giving the prescribed notices to the said institutions, the WSA requires nothing more from Bloemwater before it can limit the bulk water supply.

[19] What the applicants seek with this application has the effect of amending s4(5) without any declaration by court. The relief sought offends the separation of powers which is a tenet of our democracy. The applicants require this court to impermissibly encroach on the legislative branch of the government. The remarks in *National Treasury v Opposition to Urban Tolling Alliance*[4] are apposite in which the court said:

> "Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself…[W]hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought. The balance of convenience enquiry must now probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm."

[20] In my view, if this court would grant this order, it will be imposing on Bloemwater the obligations not required from it by the WSA. I hasten to agree that some of the conditions sought to be imposed

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[4] 2012(6) SA 223 (CC) paras 44-47.

fall within the powers of the Minister[5] but there is no obligation on Bloemwater to trigger them. Those are the powers of the Minister. While s29 of the WSA provides that the primary activity of a water board is to provide water services to other water services institutions, this does not require in case of non-payment of the amounts due to it, before limiting bulk water supply, that Bloemwater should seek the intervention of the Minister.

[21] In *Minister of Higher Education and Training and Another v Mthembu and Others: Council of the Central University of Technology and Another, Free State v Minister of Higher Education*[6] the court said:

"[24] Sitting as a judge having to interpret a section in a statute, I am cautioned by the maxim *iudicis est ius dicere sed non dare/facere*, or put otherwise, it is the duty of the judge to expound, interpret or explain the law, but not to make it. The following warning of Lourens Du Plessis should also be adhered to:

"at any rate, tampering with the *ipsissima verba* of a statute, though not precluded, should be an exercise in circumspection and restraint with due deference to one of the cornerstones of constitutional democracy, namely the horizontal division of power in the state. The wording of a legislative text bounds state authority for *trias politica* purposes. The interpreter-judge is no legislator and must constantly remind him-/herself of that. Adaptive interpretation is meant to make sense of the legislature's law as it stands and not to substitute the judges law for it."

[22] It is my considered view that the granting of the relief sought by the applicants would go against the plain reading of s4(5) and would effectively amend the provisions of s4(5) of the WSA. This would accordingly be in direct contravention of the WSA and

[5] See sections 63 to 65 of the WSA.
[6] [2021] ZAFSHC 144 at para 24.

would offend the separation of powers. The relief sought is thus incompetent. For this reason, this application must fail. It is in my view unnecessary to traverse the remaining issues in dispute as the finding I made is dispositive of this application.

[23] The issue of costs lies in the discretion of the court. It is true that in this case the applicants did not raise any constitutional issue and the Biowatch principle ought not apply. However, the reason behind this application highlights a painful picture of communities paying for the services to the Municipality in order to have access to basic commodities like water but still enduring the water cuts by suppliers the water services institutions like Bloemwater. The communities attempt to do everything within the confines of the law to assert their constitutional rights albeit at times not successful. It cannot be said that the application was vexatious. In my view it would be in the interests of justice that each party should bear its own costs and I exercise my discretion accordingly. I order as follows:

ORDER

1. The application is dismissed.
2. Each party shall bear its own costs.

P.E. MOLITSOANE

On Behalf of the Applicant:	Adv. A De Vos, SC Adv D. Brand
Instructed by:	UFS Law Clinic Bloemfontein
On Behalf of First respondent:	Adv. N Snullenburg, SC Adv Mazibuko
Instructed by:	Matlho Attorneys 02nd Floor,Metropolitan Building 96 Henry Street Bloemfontein