IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO:.2200/09

In the matter between;

MANDLA BUSHULA **APPLICANT**

And

UKHAHLAMBA DISTRICT MUNICIPALITY **RESPONDENT**

JUDGMENT

PAKADE ADJP:

[1] This application raises important constitutional issues concerning one of the crucial statutes enacted to provide to the community, the rights of access to basic water supply and basic sanitation: the Water Services Act, 108 of 1997. This legislation is intended to meet the requirements of section 27 (1) (b) and (2) of the Constitution, Act 108 of 1996.

[2] Section 27(1) and (2) of the Constitution provides:

> "(1) everyone has a right to have access to –
>
> (a)…

(b) Sufficient food and water.

(2) The state must take reasonable legislative and other measures within the available resources, to achieve the progressive realization of each of these rights."

[3] This application seeks a *mandamus* directing the respondent, a District Municipality, to restore to the community of Kwa-Ngquba Locality, Voyizana Administrative Area, Sterkspruit, the basic water supply which was discontinued from October 2008.

[4] The Water Services Act 108 of 1997 (the Act) was enacted to protect the water rights enshrined in section 27 (1)(b) and (2) of the Constitution. The relevant excerpt of the preamble to this Act reads:

"RECOGNIZING the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and environment not harmful to health or well-being;

ACKNOWLEDGING that there is a duty in all spheres of Government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable;

ACKNOWDLEDGING that all spheres of Government must strive to provide water supply services and sanitation services sufficient for subsistence and sustainable economic services;

ACKNOWLEDGING that although Municipalities have authorities to administer water supply services and sanitation services, all spheres of government have a duty within the limits of physical and financial feasibility, to work towards this object"

[6] The main objects of this Act are , *inter alia,* to provide for the right to basic water supply and the right to basic sanitation necessary to secure sufficient water and environment not harmful to human health or well-being. Section 3 of the Act provides:

> "(1) Everyone has a right of access to basic water supply and basic sanitation;
>
> (2)Every water services institution must take reasonable measures to realize these rights;
>
> (3) Every water services authority must, in its water services development plan, provide for measures to realize these rights."

[7] The respondent is the water services authority as defined in section 1 of the Act.

[8] The applicant is a resident of Kwa-Ngquba Locality, Voyizana Administrative Area, Sterkspruit. He has launched this application in his personal capacity and on behalf of the community of Kwa-Ngquba. However, there are no confirmatory affidavits from any of the members of the community, especially to counter the defence of the respondent that the water supply from the communal tapes was discontinued with the consent of the community.

[9] The applicant's case, pleaded by him in his founding affidavit, is crisply that in 2001, the respondent installed water pipes in Kwa-Ngquba and in 2004 supplied portable water from communal taps sourced from Hlahatsi dam. The water supply service was running efficiently and smoothly up to October 2008 when it came to a complete stop without prior notice to the

community. The community was forced to draw water from springs such as Madlahagu Bedesida and Mchatwini springs. These springs are polluted by livestock and pigs which often swim and bath therein because they are not fenced in and are extremely unhygienic.

[10] From February 2009, the respondent commenced a supply of water by truck cartage but this service was inadequate for the large community of that area. Those trucks did not reach the areas where the homesteads were located far from the main road. The arrival of the trucks in the area was not scheduled for the community to know when they would arrive as they could just arrive at random and quite unexpectedly. At times when a truck arrives, there would be a congestion caused by the members of the community rushing for water, something which resulted in long ques resulting to some of the people not getting water for that particular day.

[11] The water supply by trucks also came to a complete stop in June 2009. It again started operating in September 2009 and stopped soon thereafter.

[12] Towards the end of September 2009 the respondent installed three two thousand water carrying capacity Jojo tanks within a distant of 1,5 kilometers from the nearest homestead.

[13] The respondent's version is that the installation of the pipe lines into that area was done under the drought relief funds of the financial year 2004/2005. The quality of water forced the respondent to produce more than its designed capacity because of the water demand arising from unauthorized yard connections by the communities. As a result the quantity of water

produced by the plant detoriated due to increase in production to meet the increased demand for water. This water was of a low class and unhygienic. A decision was therefore taken by the respondent, as advised by scientific analysis, to decrease the quantity of water produced and increase its quality.

[14] The Voyizana line that serves Kwa-Ngqula is the one that has too much diversion of water from the main line into the households thus decreasing the water supply to the further ends of the pipe lines. As I understand the version of the respondent, it is the community of Kwa-Ngquba itself that created the water problem which ultimately disadvantaged them. The supply of water into the households had not been catered for and budgetted for by the respondent.

[15] The problem created by the community forced the respondent to upgrade the water supply scheme. This project, which is under way, is still at a design stage and is estimated to be completed during 2012. These facts have not been disputed by the applicant in his replying affidavit. This confirms, in my view, the respondent's averment that the project was discussed with the community which agreed that Jojo tanks should be supplied in the meantime.

[16] Section 27(1) and (2) of the Constitution must be read together as defining the scope of the positive rights that everyone has, and the corresponding obligations of the state to respect, protect, promote and fulfill such rights. In **Minister of Health and others vs Treatment Action Campaign and others** [1]the Constitutional Court held:

1 (2) 2000 (5) SA 721 (CC)

> "Although evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether the measures adopted by the state are reasonable, the socio-economic rights of the constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. It is impossible to give everyone access even to a core service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in section 26 and 27 on a progressive basis."

[17] In my view the installation of the water pipes on a draught relief budget was a reasonable legislative measure taken by the municipality within its available resources to achieve the progressive realization of the right to have access to sufficient water. This measure was complemented by the decision of the municipality, upon realizing that the water supply was dislocated by illegal diversions into the households, by embarking on the upgrade scheme of the water supply in Sterkspruit. The community of Kwa –Ngquba is not completely without the supply of water as there are Jojo tanks that have been installed to supply them with water. There is, however, a dispute as to whether the number of Jojo tanks installed is sufficient or not to provide adequate supply to the community. In my view, if they are not sufficient, it is for the community to request the municipality to supply some more tanks to cater for their need.

[18] It is not the applicant's case that there are no reasonable legislative and other measures in place in Sterkspruit to achieve the progressive realization

of the right to have access to water. His case is built on the notion that there are problems encountered in the present water supply service. It is not that there is no provision for water in Sterkspruit made by the respondent in compliance with the Constitution. There are water pipes installed which supplied water to the community until the supply was stopped by the very community by diverting the water to their households without the consent of the Municipality. Upon becoming aware of the water shortage, the Municipality took reasonable measures in terms of the Constitution and the law to ensure that the community of Kwa-Ngquba was not left without the supply of water. It then introduced water cartage by trucks and upon realizing that that measure was not providing an efficient water supply in compliance with the constitution, the Municipality then decided to upgrade the water supply and, by agreement with the community, introduced the supply of water through Jojo tanks in the meantime.

ORDER

[19] In the circumstances I am of the respectful view that the applicant has failed to show that the respondent breached section 27(2) of the Constitution read with section 3 sub-sections (2) and (3) of the Water Services Act, 108 of 1997.

The following order is therefore made:

1. The application is dismissed.
2. The applicant is ordered to pay costs of the application, including if any, all reserved costs.

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L.P Pakade

ACTING DEPUTY JUDGE PRESIDENT

For the applicant	**:**	**Mr Hinana**
Instructed by	**:**	**V.V Msindo & Associates**
For the respondent	**:**	**Mr Ntshiba**
Instructed by	**:**	**M.I Ntshiba & Associates**
Date Heard	**:**	**19 April 2011**
Date Delivered	**:**	**12 January 2012**