**IN THE WATER TRIBUNAL OF SOUTH AFRICA**
**HELD IN PRETORIA**

**Case Number: WT01/17/MP**

In the Appeal between:

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| **SAVE THE MAIZEBELT SOCIETY** | **APPELLANT** |
| And | |
| **DEPARTMENT OF WATER AND SANITATION** | **FIRST RESPONDENT** |
| **DIALSTAT TARDING 115 (PTY) LTD** | **SECOND RESPONDENT** |

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Date of hearing: 4 March 2024
Date of judgement: 4 April 2024

Coram: Adv Puseletso Loselo, Chairperson of the Water Tribunal

Adv N. Lekgetho, Additional Member of the Water Tribunal

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**JUDGEMENT**

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*Introduction*

1. This is an interlocutory application lodged by Save the Maize Belt Society ("the appellant"), seeking an order that the pending appeal should not proceed until the High Court proceedings, instituted in the Gauteng Division of the High Court, Pretoria, under case number 53477/2, have been finalised.

2. In the alternative, the appellant seeks an order, by the Tribunal, that Adv Maake and Ms Kvalsvig, who adjudicated some aspects of this matter which are now purportedly pending before the High Court ("the erstwhile Tribunal") be recused first, before the pending appeal can be commenced with *de novo*, by the members of the newly appointed Water Tribunal ("the current Tribunal"). The appellant claims that the current Tribunal does not have jurisdiction to adjudicate upon its pending appeal, as the erstwhile Tribunal is still seized with its appeal.

3. In support of its application, the appellant made written submissions, after being so directed at the hearing of the application on 4 March 2024, *albeit* that it was for the second time that they were so directed. It is worth mentioning that this application was not supported by any affidavit.

4. In its written submission, submitted on 8 March 2024, the appellant raised several issues including the complaint lodged against the erstwhile chairperson of the Tribunal, Adv Maake, the reconstruction of the appeal records and all ancillary matters related to the overall background of the appeal. In this matter we will not determine these issues but will only focus on the two points raised by the appellants in its application, namely, the lack of jurisdiction by the Tribunal to adjudicate on the pending appeal and the issue of *lis pendens*.

*Background*

5. The dispute between the parties stems from a water use license ("WUL") granted to Dialstat Trading (Pty) Ltd ('the second respondent") on 26 October 2016, by the

Department of Water and Sanitation ('the first respondent'). Pursuant to the granting of the WUL in favour of the second respondent, the appellant lodged an appeal in terms of s148 of the National Water Act, 1998 (Act No. 36 of 1998), ('*the Act*') on 15 December 2016 ('*the pending appeal*').

6. The erstwhile Tribunal, consisting of Adv Maake, who was the Chairperson and Ms Kvalsvig (an additional member), was seized with the matter and commenced the proceedings of the appeal. The appeal was set down for hearing on 30 to 31 January 2020.

7. It is common cause that on 31 January 2020, the hearing of the appeal was adjourned for the erstwhile Tribunal to provide a written decision on whether it has jurisdiction to deal with the incomplete record and to accept a reconstructed record. On 13 December 2020, the erstwhile Tribunal, handed down its ruling that the Tribunal had the necessary jurisdiction and broader powers to give directions on the reconstruction of the record.

8. Pursuant to the ruling for the reconstruction of a record of appeal, Adv Maake issued a directive, in February 2021, appointing Mr Mokgalabone, who was the then additional member of the Tribunal, to manage the re-construction of the appeal record and to chair a pre-trial conference in relation thereto.

9. On 18 February 2021, Mr Mokgalabone commenced with the pre-trial conference where all parties fully ventilated the issues relating to the reconstruction of the appeal record. Mr Mokgalabone issued further directives and the proceedings were adjourned until 11 March 2021 and again on 14 April 2021.

10. On 11 June 2021, Mr Mokgalabone ruled that the reconstructed record is sufficient to conduct a proper appeal hearing and that the appellant will not be prejudiced. The matter was referred back to the erstwhile Tribunal for the hearing of the appeal.

11. On 5 March 2012, the appellant lodged an application for the recusal of the erstwhile Tribunal. The recusal application was heard on 10 and 30 August 2021. The application was dismissed. The appellant was directed to, if it so wished, inform the Registrar of the Tribunal of its decision to take the decision to dismiss its recusal application on appeal, on or before 30 September 2021.

12. Dissatisfied with the erstwhile Tribunal's decision refusing to recuse themselves from the hearing of the appeal, the appellant elected to approach the High Court for the review of that decision. The review application remains pending. In the meantime, the erstwhile Tribunal's term of office came to an end in May 2023. The members of the current Tribunal were appointed on 2 August 2023.

13. The pending appeal is now set down for hearing from 20 to 24 May 2024. This application is made to halt of the trial. Despite having been directed to deliver written submissions in support of its application on or before 2 February 2024, the appellant failed to do so.

14. The Appellant did not deliver any supporting affidavit or evidence in support of its application. After failing to submit written submissions on 2 February 2024, as directed, the appellant made oral submissions at the hearing of 5 March 2024, where it was further directed to submit its written submissions on or before 8 March 2024. The

Tribunal only had regard to the oral and written submissions made by the appellant on 4 and 8 March 2024, respectively.

15. In both its oral and written submissions, the appellant vehemently argued that the pending appeal cannot be proceeded with, as it is a subject of the pending review application proceedings before the High Court.

16. According to the appellant, the pending review application before the High Court, if successful, would have the effect of rendering the Tribunal proceedings that are set down for 20 to 24 May 2024, null and void. To use the appellant's words, the positive outcome of the review application would be to undo all that has been done by the erstwhile Tribunal, relating to the appeal.

17. During oral submissions, the appellant further raised the issue of the current Tribunal's lack of jurisdiction to proceed to hear the appeal, because the erstwhile Tribunal is still seized with this appeal. This argument is untenable.

18. The appellant repeated this argument in its written submission in relation to the current Tribunal. They contend that the erstwhile Tribunal is still seized with the appeal and that until such time that they have recused themselves the current Tribunal does not have the jurisdiction to adjudicate what the appellant called an incomplete appeal proceedings.

19. We state from the outset that the current Tribunal is not adjudicating a pending appeal between the parties. The appeal has not commenced as no evidence has been led. Only

preliminary procedural issues were dealt with by the erstwhile Tribunal. The current Tribunal is now in place to convene the proceedings of the appeal.

*Issues to be determined*

20. The Tribunal is called upon to determine, in the main, two crystal issues, namely, whether the current Tribunal has jurisdiction to hear the appeal, and whether there is *lis pendens* between the parties.

*Evidence*

21. No affidavit was filed in support of this application. The appellant made oral and written submissions in support of its application. The first and second respondents made oral and written submissions in opposing this application.

22. The appellant attached some documents to its written submissions purporting to be annexures to its heads of arguments. That is not the correct manner of presenting evidence before the Tribunal. The documents ought to have been attached to an affidavit in support of this application. Although the respondents did not dispute the contents of the purported annexures, the Tribunal did not consider the annexures as same ought to have been presented as evidence in support of the application.

*Jurisdiction of the Tribunal*

23. Chapter 15 of the Act provides for the establishment of the Tribunal as an independent body, whose members are appointed through an independent selection process. In terms of s 146 of the Act the Tribunal has jurisdiction in all the provinces of the Republic.

24. It is common cause that the term of office of the previous members of the Tribunal came to an end in May 2023. The term of office of the current members of the Tribunal commenced on 2 August 2023 for a period of four years.

25. The Act and the Rules made in terms of the Act, makes no provision for transitional measures relating to how matters pending before the erstwhile Tribunal are to be dealt with once the term of office of members of the Tribunal comes to an end. It also makes no provision on how the current members of the Tribunal are to deal with such matters.

26. Section 148(5) of the Act empowers the chairperson of the Tribunal to make rules which govern the procedure of the Tribunal, including the procedure for lodging and opposing an appeal or an application and the hearing thereof by the Tribunal.

27. The Tribunal is accordingly empowered to adopt any procedure that it deems appropriate in the circumstances, including the invocation of the High Court Rules.

28. During its oral submission, the appellant argued that the provisions of s9(7)(a) of the Magistrates' Courts Act 32 of 1944, ('Magistrates' Court Act') provides direction as to what should happen when a presiding officer of a pending case is no longer available.

29. The first respondent refuted the relevance and applicability of the provisions of the Magistrates' Court Act to the proceedings of the Tribunal on the basis that the Magistrates' Court Act is only applicable to a situation where there has been a plea entered, in which case the presiding officer seized with the matter is obliged to continue with the case until it is finalised. As for the Tribunal, the appellant's appeal had not commenced, and its merits has not been pleaded to and therefore the provisions of the Magistrate's Courts Act are not applicable.

30. Section 9(7)(a) of the Magistrates' Courts Act, provides that:

> *"(a) A magistrate ... who presided in criminal proceedings in which a plea was recorded ... , shall, notwithstanding his or her subsequent vacation of the office of magistrate at any stage, dispose of those proceedings and, for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings-*
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> *(i) in which he or she participated, including an application for leave to appeal in respect of such proceedings; and*
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> *(ii) which were not disposed of when he or she vacated the office of magistrate.*
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> *(b) The proceedings contemplated in paragraph (a) shall be disposed of at the court where the proceedings were commenced, unless all parties to the proceedings agree unconditionally in writing to the proceedings being resumed in another court mentioned in the agreement." (Own emphasis)*

31. The first respondent contends, correctly so, that s 146 of the Act does not have a similar provision to s 9(7)(a) of Magistrates' Courts Act. The Tribunal is a creature of statute and can only do what the Act provides. The Act provides that the chairperson of the

Tribunal can make rules to govern the procedure to be followed at the Tribunal. It is common cause that the current rules do not provide for a situation where the term of office of a Tribunal has come to an end and there are pending appeal cases.

32. The appellant's reliance on s 7(9)(a) of the Magistrates' Court Act cannot be sustained. That provision is applicable where there has been a plea recorded in a criminal case. This means prior to any recordal of a plea, a criminal case is not regarded as partly heard for purposes of retaining a presiding officer whose term of office has lapsed.

33. In any event, the Tribunal is not akin to a criminal court. The Tribunal is an administrative body performing administrative function as was held by the SCA in ***Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another***[1] as follows:

> *'[27] The Tribunal effectively had to rehear the application for the water licence. It is well recognised that an application of that nature will ordinarily qualify as administrative action, since the advent of the Constitution. Administrative appeals usually allow for the reconsideration of an administrative decision by a higher authority. Indeed, Hoexter, writing in general, says that the 'person or body to whom the appeal is made steps into the shoes of the original decision-maker, as it were, and decides the matter anew. 'However, each Tribunal falls to be considered relative to its empowering legislation.*
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> *[28] This court in South African Technical Officials' Association v President of the Industrial Court & Others 1985 (1) SA 597 (A) at 610G-I held that a body that is*

[1] *2013 1 All SA 526 (SCA).*

*empowered to perform some of the functions of a court of law is not necessarily to be regarded as a court of law. An administrative body can perform the duties and functions of a court of law without becoming one. The status and true identity of a particular body is not determined solely by the nature and the type of the functions it performs. Certain factors are indicative of whether a tribunal should indeed be seen as a court of law. This approach was approved in Sidumo, where Navsa AJ (with whom the majority of the Constitutional Court concurred on this issue) held that while there are similarities between arbitrations before the Commission for Conciliation, Mediation and Arbitration ("CCMA") established by the Labour Relations Act 66 of 1995 and proceedings before a court of law, the CCMA is not a court of law because there are also significant differences, including that: a commissioner is empowered to conduct the arbitration with the minimum of legal formalities, there is no blanket right to legal representation, the CCMA does not follow a system of binding precedents, and commissioners do not have the same security of tenure as judicial officers or undergo judicial training.*

*[29]* *In the instant matter the members of the Tribunal do not have the same security of tenure as judicial officers. Item 1 of Schedule 6 to the Act provides that a member is appointed for a period determined by the second appellant. In terms of item 4, read with s 146(8) of the Act, the appointment of a member may be terminated 'for good reason' by the second appellant and after 'consultation with the Judicial Service Commission'. The uncertain tenure of the office those selected to comprise the Tribunal, is not compatible with judicial independence.*

*[31]* *The nature of the power exercised by the Tribunal was no less and no more than a consideration of whether a water licence should be granted or not. Consequently*

*the court a quo was correct in finding that the decision of the Tribunal constituted administrative action..." (Own emphasis).*

34. The Tribunal has a legal duty under s148 of the Act to determine appeals lodged without any undue delay.

35. We do not agree with the appellant that this Tribunal does not have jurisdiction to hear its appeal on the basis that the erstwhile Tribunal is already seized with the appeal. This argument is untenable and cannot be sustained.

*Is there a pending appeal?*

36. It is common cause between all parties that the determination of the merits of the appeal have not been commenced with. All that has happened is the consideration, by the erstwhile Tribunal, of interlocutory applications made by the appellant. Those applications have been considered and finalised by the erstwhile Tribunal which made rulings that the parties are all informed of. What is now left is the actual determination of the appeal. The interlocutory rulings are valid and binding on all the parties in this matter.

37. The previous panel's term of office has lapsed and was replaced by the current Tribunal. The current Tribunal is now seized with the appeal.

38. In ***Malebane v Dykema 2018 JDR 2116 (SCA)*** at para 14, the SCA dealt with the definition of "*pending*" as follows:

'The *Concise Oxford Dictionary* defines 'pending' as meaning 'awaiting decision or settlement'. The rather longer definition in the *Shorter Oxford English Dictionary* is 'remaining undecided, awaiting settlement; origin of a lawsuit'. The *Collins English Dictionary* says that 'if something such as a legal procedure is pending, it is waiting to be dealt with or settled'. The position is no different in American English. The *Merriam-Webster* dictionary gives as the definition of pending in its adjectival sense 'not yet decided: being in continuance'. *Black's Legal Dictionary* has 'Remaining undecided; awaiting decision (a pending case)'. Implicit in each of these definitions is that what is pending is still capable of being determined...'.

39. At paragraph16 of *Malebane*, the SCA went on to state that:

> *"That a legal suit, or an application to an administrative tribunal, such as Mr* Dykema's *to the Tribunal, is only pending if the court or administrative tribunal still has the power to hear and dispose of it appears clearly from two cases, the one from Canada and the other from New Zealand. In Garnham v Tessier it was said:*
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> > *'"Litigation pending", as here used means any legal proceeding, suit or action remaining undecided or awaiting decision or settlement.'... "*

40. What is apparent is the fact that the appeal has not been considered by the erstwhile Tribunal. That panel's term lapsed and therefore, the erstwhile Tribunal had ceased to have any authority to determine the appeal. There is, therefore, no appeal pending before the erstwhile members of the Tribunal.

41. The appellant seems to have difficulty with the rulings made by the erstwhile Tribunal, relating to the jurisdiction of the Tribunal to order a reconstruction of the appeal record. The appellant further wishes to have the ruling made by the previous Deputy Chairperson of the Tribunal, Mr M R Mokgalabone on 11 June 2021, that the reconstructed record of appeal was sufficient and adequate, to be quashed. In the main, the appellant is dissatisfied with the ruling of the erstwhile Tribunal of August 2023, in which that panel refused to recuse itself from hearing the appellant's appeal.

42. Consequently, there is no impediment to the current Tribunal in considering the appeal.

*Lis pendens*

43. The appellant in its oral submissions, pointed to a purportedly pending litigation between the parties on the same cause of action. This pending litigation is a review application lodged by the appellant in the Gauteng Division of the High Court in Pretoria to review and set aside the erstwhile Tribunal's refusal to recuse itself from hearing the appeal.

44. In its written submissions, however, the appellant raised various High Court applications which are pending between the parties. The appellant points to applications under case number 59376/2018, wherein the second respondent approached the High Court to compel the former chairperson of the Tribunal to appoint members to hear the appeal. The second application referred to is the one launched by the appellant as a counter application under the same case number for an

order reviewing and setting aside the Adv Maake's failure to make rules as contemplated in section 148(5) of the Act.

45. This point will not be considered further as these two pending cases seems to have been abandoned by all parties. For purposes of this ruling these two cases will not be considered as pending litigation between the parties which would preclude the current Tribunal from hearing the appeal.

46. At paragraph 81 of the appellant's written submissions, the appellant states, as the cause of action between the parties as follows:

> *"...The said pending application entails the same parties and the cause of action, which is a review of the recusal decision by Adv Maake..."*

47. The appellant relies on the High Court application for the review and setting aside of the erstwhile Tribunal's refusal to recuse itself from hearing the appeal as a basis for its plea of a *lis pendens*.

48. It is trite law that *lis alibi pendens* is a special plea that can be raised where there is litigation pending between the same parties, based on the same cause of action, and in respect of the same subject matter.[2]

49. In ***Caesarstone Sdol-Yam Ltd. v. The World of Marble and Granite 2000 CC and Others ("Caesarstone")***[3], in describing its requirements, the SCA stated:

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[2] Nestle (South Africa) (Pty) Ltd v. Mars Inc, *2001 (4) SA 542 (SCA), paras.[16] and [17].*
[3] *2013 All SA 509 (SCA), para 2.*

*"As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere, and therefore it is inappropriate for it to be litigated in the same court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties, and that it is desirable that there be finality in litigation ..."*

50. Is there pending litigation between the parties relating to the consideration or merits of the appeal? The short answer is no. Is there any pending litigation between the parties relating to the recusal of the current Tribunal? The answer is no.

51. What is then pending between the parties that prevents the determination of the appeal? To us, there seems to be none pending. To the appellant, its review application in the High Court is the cause of complaint. It is common cause that in the review application, the appellant seeks an order reviewing and setting aside the erstwhile Tribunal's decision refusing to recuse itself from hearing the appeal.

52. It is further common cause that the erstwhile Tribunal is no longer eligible to adjudicate the appeal because its term of office has lapsed. That Tribunal has no powers any more to consider and determine the appeal including its points *in limine*. In relation to all its rulings which it has made that panel is now *functus officio*.

53. It has been established and there is no dispute that the merits of the appeal have not been heard or considered by the Tribunal and therefore there is no part heard appeal.

54. The appellant argues that the effect of the recusal of the erstwhile Tribunal will result in all the rulings made by that panel on preliminary issues to be quashed and to have the current Tribunal considering those preliminary issues *de novo*. Therefore, the current Tribunal should hold on until the review application on the recusal application has been finalised. In support of its assertion, the appellant relied on the case of ***Minister of Correctional Services v Mashiya and Others (2023) 44 ILJ 1536 (LC)*** (22 March 2023), (*'Mashiya'*) where the Labour Court held that as a general rule, where an arbitrator recuses herself or himself from an arbitration that has not been completed and is still continuing, then the proceedings must recommence before another arbitrator.

55. This argument cannot be sustained. The case relied on by the appellant is distinguishable. In *Mashiya*, the Labour Court was dealing with a review application where the previous arbitrator *mero motu* recused herself during the course of an arbitration and a new arbitrator continuing with proceedings where *de novo* arbitration was required and essential for a fair hearing. The Labour Court held that the new arbitrator simply continuing with arbitration proceedings constituted a misconduct as contemplated by s 145(2)(a) of the Labour Relations Act.

56. Contrary to this current case, in *Mashiya* the unfair dismissal arbitration was set down before arbitrator M Malebye. Both parties had been dissatisfied with the manner in which the arbitrator had handled the arbitration proceedings and applied for her recusal. The application for recusal was refused. The matter proceeded and the evidence of seven witnesses was led. At the end of 2012, the arbitrator simply *mero motu* recused herself.

57. The second respondent, who was the new arbitrator, then stepped in to deal with the matter and, after lengthy argument on the further conduct of the matter, ruled that the hearing would not start *de novo* as this would infringe on the constitutional obligation of expeditious resolution of employment disputes.[4] The Labour Court, hearing the review application found that it had not been possible for the second arbitrator to assess the credibility of the first seven witnesses who had given evidence before the previous arbitrator. In the circumstances, the second arbitrator had been unable to fulfil this duty and should have recommenced the arbitration proceedings *de novo*.

58. It is worth mentioning that in *Mashiya,* the Minister of Correctional Services, after lodging the review application against the arbitration award, also launched an urgent application for the stay of the execution of the arbitration award it sought reviewed and set aside.

59. The appellant's reliance on *Mashiya* is, therefore, misplaced and as it is not authority for the proposition made by the appellant. In this current case, there are few salient features which must be borne in mind when considering the appellant's contention that the current Tribunal should not proceed with the appeal:

59.1 there was a recusal application made against the erstwhile Tribunal, which application was dismissed. The Tribunal then proceeded to adjudicate and make rulings on the preliminary points;

[4] *Minister of Correctional Services v Mashiya and Others (2023) 44 ILJ 1536 (LC), p1558, para 67-70.*

59.2 the recusal decision was taken on review in the High Court, where it remains pending;

59.3 there has been no application to stay the appeal proceedings pending the determination of the review proceedings;

59.4 the orders made by the erstwhile Tribunal remain valid and enforceable until they are set aside on appeal or review; and

59.5 the hearing of the merits of the appeal had not commenced, as no evidence had been led regarding the merits.

60. There is, therefore, nothing precluding the current Tribunal from adjudicating the merits of the appeal, nor is there any basis for reconvening the appeal *de novo*. The appeal never started. In any case, the pending review application does not deal with the merits of the appeal, but with the refusal by the erstwhile Tribunal to recuse itself from hearing the appeal.

61. The first respondent contends that the appellant is wasting the Tribunal's time as the issue raised in the review application have become moot and academic. We agree with this argument. The review application will serve no practical purpose in relation to this appeal. This is so because the then panel's term of office has come to an end and it has, by operation of law, stopped being seized with the appeal.

62. The second respondent submits that for the defence of *lis pendens* to succeed the appellant must show that the issue before the High Court in the review application are the same as those to be determined by the Tribunal. The second respondent submits that the appellant makes an incoherent argument that the hearing of the appeal has already commenced before the erstwhile Tribunal.

63. We agreed with these submissions. The defence of *lis pendens* requires that there must be other proceedings which were instituted prior to the institution of the proceedings sought to be halted. If the appeal had been commenced with before the institution of the review application, it must follow that there were no other proceedings instituted before then.

64. The cause of action in the review application before the High Court is the lawfulness of the erstwhile Tribunal's refusal to recuse itself. The cause of action before the Tribunal is the lawfulness of the granting of a WUL to the second respondent, by the first respondent. Clearly, the causes of action are not the same. Therefore, there is no pending litigation which impedes a consideration of the appeal by this Tribunal.

65. The appellant has, therefore, failed to satisfy this ground and consequently its defence of *lis pendens* must fail.

*Conclusions*

66. We find that in the absence of any impediments to the consideration of the appeal, the appellant's appeal should be set down for hearing. The appeal was lodged in December

2016 and since then it has not been considered by the Tribunal. There is no application for the stay the appeal proceedings.

67. Various preliminary points have been raised over the years and this has prevented the appeal from being considered. The appellant blames the Tribunal and both the first and second respondents for the occasioned delays. The first and second respondent, blame the appellant for having adopted a dilatory approach in having the appeal commenced with.

68. The second respondent contends that the delays in considering and finalising the appeal is prejudicial to it. Some eight years have gone past since the issuance of the WUL to it, but due to the pending appeal, the WUL could not be given effect to. We agree with this contention. An inordinate amount of time has passed since the appeal was launched.

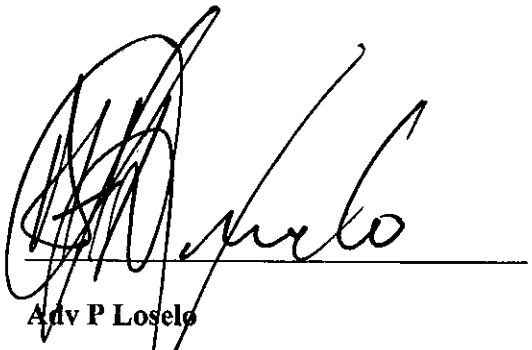
69. The Tribunal is obligated by law to deal with appeals expeditiously. It will be in the interest of all parties that the appeal be proceeded with without any further delays.

*Decision*

70. The Tribunal makes the following order:

a. the appellant's preliminary points are dismissed; and

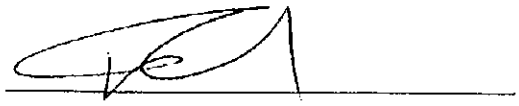
b. the Registrar is directed to set the appeal down for hearing for 20 to 24 May 2024.



**Adv P Loselo**

Chairperson of the Water Tribunal

I agree



Ms N Lekgetho

Additional member of the Water Tribunal

**Appearances:**

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|---|---|
| For the Appellant: | Ms Y Omar<br>Instructed by Zahir Omar Attorneys |
| For the 1st Respondent | Adv M Makoti<br>Instructed by State Attorney, Pretoria |
| For the 2nd Respondent: | Adv M Wesley SC<br>Instructed by Tabacks Attorneys |