IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case no: 534/2004

In the matter between

P E LOURENS NO	**1ST APPELLANT**
P J LOURENS NO	**2ND APPELLANT**
H A POTGIETER NO	**3RD APPELLANT**
J S LOURENS NO	**4TH APPELLANT**
S J KRUGER	**5TH APPELLANT**
J SENEKAL	**6TH APPELLANT**
J P B ROOS	**7TH APPELLANT**
JD DE KOCK SUIKER BOERDERY (PTY) LTD	**8TH APPELLANT**
J S VAN HEERDEN NO	**9TH APPELLANT**
M VAN HEERDEN	**10TH APPELLANT**
JABULA BELEGGINGS (PTY) LTD	**11TH APPELLANT**
A J VLOK NO	**12TH APPELLANT**
W H DU-A VLOK NO	**13TH APPELLANT**
L VLOK NO	**14TH APPELLANT**
I M RAUTENBACH	**15TH APPELLANT**
J J SCHOEMAN	**16TH APPELLANT**
M J DU PLESSIS	**17TH APPELLANT**
C R DELPORT	**18TH APPELLANT**
E P HOON NO	**19TH APPELLANT**
E P HOON	**20TH APPELLANT**
D C ODENDAAL NO	**21ST APPELLANT**
S W B SLABBERT	**22ND APPELLANT**
J B W RICHTER NO	**23RD APPELLANT**
A P STEYN	**24TH APPELLANT**
S M NAUDé BOERDERY (NQUMILE) (PTY) LTD	**25TH APPELLANT**

and

IMPALA WATER USERS ASSOCIATION	**RESPONDENT**

Coram: **HOWIE P, SCOTT, BRAND, HEHER and VAN HEERDEN JJA**

Heard: **19 MAY 2006**

Delivered: **31 MAY 2006**

Summary: **Water – National Water Act 36 of 1998 – water user association – power to make and collect water use charges under s 57 – restriction of water supply to defaulting user under s 59(3) – procedure – whether debt may be proved in court proceedings for order authorizing such restriction – proof of debt – evidence.**

Neutral citation: **This judgment may be referred to as Lourens NO v Impala Water Users Association [2006] SCA 82 (RSA).**

JUDGMENT

HEHER JA

HEHER JA:

[1] This appeal concerns the scope of the powers of a water user association established in terms of Chapter 8 of the National Water Act 36 of 1998 to make and collect charges for the use of water and the procedures which it must follow in order to recover such charges. The appellants (who were cited in the court *a quo* personally or in representative capacities) are irrigation farmers who are members of the respondent (hereinafter referred to as 'the association'), a 'water management institution' as defined in s 1 of the Act. They appeal to this Court with leave of the court *a quo* (Nicholson J) against an order made in the following terms:

'1. The applicant is hereby authorised to reduce the flow of water through its sluices and canals to each of the lots of each of the respondents to an amount of 1 000 litres per hour, and to maintain such restricted flow until the applicant's charges (together with the interest thereon) raised in respect of water supplied up to 28 February 2003 have been paid as set out in the schedule headed "KAPITAAL VERSKULDIG DEUR RESPONDENTE SOOS OP 28 FEBRUARIE 2003" annexed hereto marked "A"

2. The order in paragraph 1 hereof shall not apply to the following respondents in respect of the properties set out:-

Fifth Respondent	S J Kruger	T70
Twelfth Respondent	A J Vlok	T98
Thirteenth to Fourteenth Respondents	Vlok Familie Trust	T104
Seventeenth Respondent	M J du Plessis	T11
Twenty First Respondent	Dirk Odendaal Trust	T100
Twenty Third Respondent	J B W Richter Familie Trust	T52

3. The respondents are ordered to pay the costs of this application. Their liability shall be joint: save that respondents who are co-trustees shall be counted as one, and a husband and wife as one for the purposes of determining the proportions in which the costs shall be payable. Such costs shall include those consequent upon the employment of two Counsel.

4. The respondents are ordered to pay the costs of the application to lead further evidence, including those consequent upon the employment of two Counsel.'

[2] Although the leave granted was broad enough to encompass para 4 of the order it does not seem to me that such was the true intention of the farmers or indeed of the learned Judge. In the event no submissions were directed to that paragraph and no more need be said about it. Anomalously, an order for costs was made against those respondents named in para 2 who were expressly excluded from the effect of para 1. Counsel for the association informed us that his client had abandoned its costs order against those respondents during the hearing of the application for leave to appeal. On this basis counsel for both parties agreed that their participation in the appeal should be disregarded. I shall do so.

[3] The parties have been before this Court on a previous occasion. Then, the association appealed unsuccessfully against a spoliation order of the Natal Provincial Division (Van der Reyden J) in which it was ordered to remove locks, chains and welding works from sluices serving properties farmed by some of the present appellants and by certain other members of the association and to restore the flow of water to reservoirs on the farms. The judgment of this Court is reported as *Impala Water Users Association v Lourens NO and Others* [2004] 2 All SA 476 (SCA) (hereinafter referred to as '*Impala 1*'). Much of the argument of counsel in the present appeal turned on the meaning of that judgment and its effect on the present proceedings. In the last-mentioned regard the chronology is of some relevance.

[4] On 3 June 2002 the respondent notified its members of the imposition of water use charges for the 2002/2003 year. The major component of those charges was an amount of R800 per hectare in respect of the construction and maintenance of the Paris-Bivane Dam, a 'waterwork' within the definition in s 1 of the Act, constructed, operated and maintained by the association for the benefit of its members (although it also redounds to the benefit of many other residents of the area which it serves). The charges were due and payable by December 2002.

[5] On 1 February 2003, the association, being of the opinion that the farmers were in arrear with the payment of their water use charges, and having afforded them an opportunity to make representations as to why they were not liable to pay the charges and why the supply of water to their properties should not be restricted, took the steps required to effect such a restriction. It purported to do so in terms of s 59(3) of the Act (the terms of which are quoted in para 19 below). The farmers launched a spoliation application in the Natal Provincial Division which was granted on 14 February 2003. Leave to appeal to this Court followed three days later.

[6] However, without awaiting the outcome of the appeal the association once more resolved 'to take the necessary steps (prescribed in the Act and in its Constitution) for the purpose of ultimately restricting the flow of water to its members who remain in arrears with the payment of their water charges'. Accordingly, between 5 and 19 June 2003 notices were served on the alleged defaulters (again, purportedly in terms of s 59(3)) affording each of them 14 days within which to make representations as to why the restrictions should not be imposed. Each farmer was notified that 'Indien u die bedrag verskuldig betwis, moet u ook die detail en die gronde waarop u verskuldigheid ontken, uiteensit.'

[7] From 19 June to 21 July 2003 various farmers who had received such notices made representations through their attorney, or in person. The association rejected all such representations and resolved, on 25 August 2003, to launch an application to court to restrict the supply of water to the defaulters (including those who had not submitted representations).

[8] The application which commenced the present proceedings was launched on 3 November 2003 and on 9 December 2003 was argued before Nicholson J in the Natal Provincial Division. Judgment was reserved.

[9] On 24 February 2004 the appeal against the spoliation order in *Impala 1* was argued in this Court. Judgment was delivered on 26 March 2004, dismissing the appeal.

[10] On 13 April 2004 the farmers applied for leave to lead further evidence in the application in which judgment was pending. That application was argued before Nicholson J on 11 June 2004. On 1 July 2004 the learned Judge delivered the judgment which is now appealed against. On the same day an application for leave to appeal was filed. On 28 September 2004, new counsel having been brought in to represent the farmers, amended grounds of appeal were delivered. On 8 October 2004 Nicholson J granted leave to appeal in respect of only the new grounds (which contained matters not argued before him in the application). Of these grounds it is, for the purposes of this judgment, necessary to identify only the following: that the court *a quo* should have found that the procedure in s 59(4) of the Act is not intended for the ascertainment of liability or its extent; where the precise amount owing, if any, is in dispute or not fixed with certainty, reliance on s 59(3) or (4) is premature and unlawful.

[11] From the aforegoing history it will be observed that the application which gave rise to this appeal was brought and argued before the appeal in the spoliation application had been argued and without the benefit of the judgment in that appeal. The judgment of Nicholson J, although delivered after the judgment in *Impala 1* was handed down, contains only passing references to it, probably because the argument before him had been directed elsewhere. It was apparently only when the counsel for the farmers applied their minds to the matter that the judgment took on significance and caused them to formulate certain of the new grounds of appeal as they did.

[12] Counsel in the present appeal were unfortunately not *ad idem* as to the thrust of the judgment in *Impala 1*. As will be seen this was, from the association's side, partly a consequence of needing *ex post facto* to reconcile the approach which had been adopted on its behalf in the formulation of the application with the terms of the eventual judgment in *Impala 1*. Most particularly counsel for the association was hampered by his contention in the first appeal (which this Court had rejected) that the applicant for the spoliation order carried an onus to prove that the purported reliance by the association on its statutory powers had been unlawful. Once that submission failed, as the judgment demonstrates, and the onus rested on the association to show that portion of the water charges not paid was legally due, the appeal in *Impala 1* had to fail:

'As counsel for the respondents (correctly in my view) submitted, in view of the fact that the question as to whether the unpaid portion of the water use charge is legally due by the respondents is the subject of other proceedings in the court *a quo* and the appellant consented in its summary judgment application to an order giving the respondents concerned leave to defend, that question must be regarded for present purposes as an open one.' (para 27 of the judgment)

[13] At the commencement of this appeal counsel for the farmers moved to amend the grounds of appeal to include the following question: Whether the dam financing component of the association's charges qualifies as 'water use charges' under Chapter 5 (and, particularly, ss 57 and 59) of the Act. The Court directed that a decision on the supplementation of the grounds of appeal would be made only after its merits had been considered. The appeal was then argued in full. As the argument developed it seemed that the emphasis broadened to a submission that not only the imposition and recovery of the dam component but also all water use charges contemplated by s 57 fell outside the purview of a water use association such as the respondent. Counsel made no attempt in argument to distinguish the nature of the dam financing component from other water use charges. It will be appreciated that there is an

inconsistency in this approach since their clients conceded liability to the association for the payment of 'water use charges' (R240 per hectare per year) but disputed liability for the dam financing component over and above that amount.

The lawfulness of the association's claim to make water use charges (including the dam financing component) and its reliance upon s 59 to recover such charges.

[14] Counsel for the farmers set out to persuade us that the powers to make and collect water use charges within Chapter 5 of the Act (ss 56 to 62) vested in a 'catchment management agency' or, before the establishment of such a body, the Minister of Water Affairs. The whole country has, it is common cause, been divided into nineteen 'water management areas' and the respondent operates in Area 6: Usutu to Mhlatuze. In s 1 of the Act

'"water management area" is an area established as a management unit in the national water resource strategy within which a catchment management agency will conduct the protection, use, development, conservation, management and control of water resources;'.

(In the schedule to the notice establishing the water management areas and their boundaries pursuant to the terms of s 5(1) of the Act, published in GN 1160 of 1 October 1999, the boundary description of Usutu to Mhlatuze is 'Primary drainage region W' which accords with the definition of 'catchment' in s 1 of the Act.)

[15] In s 80 of the Act the initial functions of a catchment management agency are-

'(a) to investigate and advise interested persons on the protection, use, development, conservation, management and control of the water resources in its water catchment area;

(b) to develop a catchment management strategy;

(c) to co-ordinate the related activities of water users and of the water management institutions within its water management area;

(d) to promote the co-ordination of its implementation with the implementation of any applicable development plan established in terms of the Water Services Act, 1997 (Act 108 of 1997); and

(e) to promote community participation in the protection, use, development, conservation, management and control of the water resources in its water management area.'

A catchment management agency must be funded by (a) money appropriated by Parliament; (b) water use charges; and (c) money obtained from any other lawful source for the purpose of exercising its powers and carrying out its duties in terms of the Act (s 84(2)).

[16] From this solid base counsel went on to demonstrate that the policy of the statute is to confer on a catchment management agency the responsibility within a water management area for ensuring equitable access to water through the establishment of strategies for the protection, use, development, conservation, management and control of water (s 8). He pointed to the important role played by the 'responsible authority' in controlling and regulating the use of water (Chapter 4 of the Act). In s 1

"'responsible authority', in relation to a specific power or duty in respect of water uses, means-

(a) if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency, or

(b) if that power or duty has not been so assigned, the Minister;".

Counsel emphasised that the Act created an entity defined in s 1 as follows:

'"water management institution" means a catchment management agency, a water user association, a body responsible for international water management or any person who fulfils the functions of a water management institution in terms of this Act;.'

He submitted that, within the hierarchy of structures created by the Act, a water user association is subsidiary to a catchment management agency and that, where the Act confers powers or duties on an unspecified authority to act 'within a water management area' (as it does in s 57(1)), the necessary inference is that the power in question is conferred upon a catchment management agency as the primary authority having jurisdiction over the whole of such an area. Counsel referred to s 86(2)(b)-

'(2) A catchment management agency may not delegate-

. . . . .

(b) any power to make water use charges.'

[17] Counsel contrasted the status and powers of a water user association with that of a catchment management agency. Although the former enjoys statutory recognition it is, he submitted, hardly more than a voluntary association formed to serve the needs of its members, a limited number of water users. Most notably it does not exercise the wide powers and duties in relation to the equitable use, management and control of water to a broad range of persons and communities (not just farmers) that a catchment agency does. The construction and management of a large dam (as the Paris-Bivane dam is) and the equitable distribution of its water must necessarily, counsel submitted, be the responsibility of a catchment management agency and fall beyond the legitimate interest of a water user association. If therefore such an association undertook the construction of a dam (or took over responsibility for the dam from its predecessor in law such as an irrigation board, as was the case with the Impala Water Users Association) then, while the members might lawfully be saddled with the cost of the project, the charges so levied would not be water use charges as contemplated by the Act and, specifically, not such as to fall within the scope of Chapter 5 which deals with 'Financial Provisions'.

[18] It was in the light cast by this general overview of the policy and rights and duties in relation to water use, management, and control, counsel submitted, that Chapter 5 had to be understood and interpreted.

[19] The argument is a powerful one and requires careful consideration. Because Part 1 of Chapter 5 needs to be read and understood as a whole it will be convenient to set it out *in extenso* at this point:

'56 **Pricing strategy for water use charges**

(1) The Minister may, with the concurrence of the Ministry of Finance, from time to time by notice in the *Gazette*, establish a pricing strategy for charges for any water use within the framework of existing relevant government policy.

(2) The pricing strategy may contain a strategy for setting water use charges-

(a) for funding water resource management, including the related costs of-

(i) gathering information;

(ii) monitoring water resources and their use;

(iii) controlling water resources;

(iv) water resource protection, including the discharge of waste and the protection of the Reserve; and

(v) water conservation;

(b) for funding water resource development and use of waterworks, including-

(i) the costs of investigation and planning;

(ii) the costs of design and construction;

(iii) pre-financing of development;

(iv) the costs of operation and maintenance of waterworks;

(v) a return on assets; and

(vi) the costs of water distribution; and

(c) for achieving the equitable and efficient allocation of water.

(3) The pricing strategy may-

(a) differentiate on an equitable basis between-

(i) different types of geographic areas;

(ii) different categories of water use; and

(iii) different water users;

(b) provide for charges to be paid by either-

(i) an appropriate water management institution; or

(ii) consumers directly;

(c) provide for the basis of establishing charges;

(d) provide for a rebate for water returned to a water resource; and

(e) provide on an equitable basis for some elements of the charges to be waived in respect of specific users for a specified period of time.

(4) The pricing strategy may differentiate under subsection (3) (*a*)-

(a) in respect of different geographic areas, on the basis of-

(i) socio-economic aspects within the area in question;

(ii) the physical attributes of each area; and

(iii) the demographic attributes of each area;

(b) in respect of different types of water uses, on the basis of-

(i) the manner in which the water is taken, supplied, discharged or disposed of;

(ii) whether the use is consumptive or non-consumptive;

(iii) the assurance and reliability of supply and water quality;

(iv) the effect of return flows on a water resource;

(v) the extent of the benefit to be derived from the development of a new water resource;

(vi) the class and resource quality objectives of the water resource in question; and

(vii) the required quality of the water to be used; and

(c) in respect of different water users, on the basis of-

(i) the extent of their water use;

(ii) the quantity of water returned by them to a water resource;

(iii) their economic circumstances; and

(iv) the statistical probability of the supply of water to them.

(5) The pricing strategy may provide for a differential rate for waste discharges, taking into account-

(a) the characteristics of the waste discharged;

(b) the amount and quality of the waste discharged;

(c) the nature and extent of the impact on a water resource caused by the waste discharged;

(d) the extent of permitted deviation from prescribed waste standards or management practices; and

(e) the required extent and nature of monitoring the water use.

(6) In setting a pricing strategy for water use charges, the Minister-

(a) must consider the class and resource quality objectives for different water resources;

(b) may consider incentives and disincentives-

(i) to promote the efficient use and beneficial use of water;

(ii) to reduce detrimental impacts on water resources; and

(iii) to prevent the waste of water; and

(c) must consider measures necessary to support the establishment of tariffs by water services authorities in terms of section 10 of the Water Services Act, 1997 (Act 108 of 1997), and the use of lifeline tariffs and progressive block tariffs.

(7) Before setting a pricing strategy for water use charges under subsection (1), the Minister must-

(a) publish a notice in the *Gazette*-

(i) setting out the proposed pricing strategy; and

(ii) inviting written comments to be submitted on the proposed strategy, specifying an address to which and a date before which the comments are to be submitted, which date may not be earlier than 90 days after publication of the notice;

(b) consider what further steps, if any, are appropriate to bring the contents of the notice to the attention of interested persons, and take those steps which the Minister considers to be appropriate; and

(c) consider all comments received on or before the date specified in the notice.

57 Application of pricing strategy

(1) Water use charges-

(a) may be made-

(i) within a specific water management area; or

(ii) on a national or regional basis; and

(b) must be made in accordance with the pricing strategy for water use charges set by the Minister.

(2) Charges made within a specific water management area may be made by and are payable to the relevant water management institution.

(3) Charges made on a national or regional basis-

(a) may be made by the Minister and are payable to the state; and

(b) may be apportioned between different water management areas according to the extent of the specific benefits which each water management area derives or will derive from the water uses for which the charges are made.

(4) Any person liable to pay water charges to a water services institution as defined in the Water Services Act, 1997 (Act 108 of 1997), for water supply services or sanitation services may not be charged for those services in terms of this Act.

(5) No charge made under this Act may be of such a nature as to constitute the imposition of a tax, levy or duty.

58 Recovery of water use charges

(1) The Minister may direct any water management institution to recover any charges for water use made by the Minister under section 57 (1) (*a*) from water users within its water management area or area of operation, as the case may be.

(2) A water management institution which has been directed to recover any such charges may retain such portion of all charges recovered in order to recompense it for expenses and losses, as the Minister may allow.

(3) A water management institution which has been directed to recover any such charges-

(a) is jointly and severally liable to the state with the water users concerned; and

(b) may recover any amounts paid by it in terms of paragraph *(a)* from the water users concerned.

59 Liability for water use charges

(1) Water use charges contemplated in this Chapter-

(a) may only be made in respect of a water use to which a person is voluntarily committed; and

(b) must bear a direct relationship to the water use in question.

(2) Any person registered in terms of a regulation under section 26 or holding a licence to use water must pay all charges imposed under section 57 in respect of that water use.

(3) If a water use charge is not paid-

(a) interest is payable during the period of default at a rate determined from time to time by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*; and

(b) the supply of water to the water user from a waterwork or the authorisation to use water may be restricted or suspended until the charges, together with interest, have been paid.

(4) A person must be given an opportunity to make representations within a reasonable period on any proposed restriction or suspension before the restriction or suspension is imposed.

(5) Where there is a fixed charge, a restriction or suspension does not relieve a person of the obligation to pay the charges due for the period of the restriction or suspension.

(6) A person whose water use is restricted or suspended for any lawful reason may not later claim the water to which that person would otherwise have been entitled during the period of restriction or suspension.

60 Water use charges are charges on land

(1) A charge made in terms of section 57 (1), including any interest, is a charge on the land to which the water use relates and is recoverable from the current owner of the land without releasing any other person who may be liable for the charge.

(2) The Minister or relevant water management institution must-

(a) on written application by any person; and

(b) within 30 days of the application,

issue a certificate stating the amount of any unpaid water charges and any interest due in respect of any land.

(3) If a certificate is not issued within the period of 30 days, the provisions of subsection (1) cease to apply to that property, notwithstanding section 66.'

[20] What strikes the reader (in the context of the submissions which we are assessing) is the absence of any specific reference to a catchment management agency or 'responsible authority' in the quoted sections.

[21] The heart of the financing provisions lies in the creation of a pricing strategy for water use charges (s 56) which is sufficiently flexible to differentiate on an equitable basis between geographic areas, categories of water use and different users (s 56(3)(a)) and which may provide for charges to be paid by either an appropriate water management institution or consumers directly. It appears, therefore, to be contemplated that a water user association may itself be levied with such charges which of necessity it will have to recover, at least in part, by reciprocal levies on its members.

[22] It is not in dispute that the Minister has set a pricing strategy as contemplated by s 56 and that the association is purporting to implement it. Although we have not

been furnished with a copy of the strategy we were informed by counsel that it embraces the objectives of s 56(2)(b) including the cost of operation and maintenance of waterworks. A ‘waterwork’ includes any borehole, structure, earthwork or equipment installed or used for or in connection with water use (s 1). Counsel are agreed that such waterworks would include the Paris-Bivane dam if the submission of counsel for the farmers is *not* accepted that a dam constructed privately and at its own cost by a ‘private’ institution such as a water management association does not fall within the scope of s 56. That submission is, in itself, startling in its consequences, since the dam in question is apparently a waterwork of consequence which supplies water to many persons not members and beyond the jurisdiction of the association and its exclusion from the pricing strategy simply on the strength of its ‘private’ funding would surely be to ignore a major water resource and might serve to unbalance the strategy (the more so, of course, if other dams financed on a similar basis exist in other water management areas).

[23] The language of s 57(2) may, *prima facie*, appear to run against the thrust of the farmer’s submissions in support of the proposed ground of appeal. This provision confers the specific power to make water use charges. Instead of attaching that power to a catchment management agency or to identified authorities within the definition of a ‘water management institution’, the statute provides that the authority which shall exercise the power is ‘the relevant water management institution’. That is an expression which opens the search for the identity of the relevant institution to other provisions of the Act. Appellants’ counsel submitted that one need look no further than the words in s 57(1)(a) which authorises the making of charges ‘within a specific water management area’: because such an area is (as previously pointed out) defined as one established as a management unit in the national water resource strategy within which a catchment management agency conducts the management, use and control of

water resources, the catchment agency for a particular area is, he submitted, necessarily ‘the relevant water management institution’ within its own area.

[24] Attractive as this submission is, it requires closer examination. A water user association must also operate ‘within’ a water management area and whether s 57 (2) can properly be extended to confer authority on such an association is not conclusively answered by s 57(1)(a). Nor indeed is it answered by the mere use without reference to the context in any section of the Act of the expression ‘within a water management area’; the use of the expression ‘within its water management area’ on which counsel relied is not fairly comparable since the possessive serves to identify the institution in question, which is, in the context, usually a catchment management agency, see eg s 8(1), 9(c), 58(1), 78(1)(a), 79(3), 80(a) and 87(1)(b) and (e).

[25] Counsel agreed that s 58 of the Act is not directly relevant to the present dispute as it clearly applies to the powers conferred by s 57(1)(a)(ii) to make charges on a national or regional basis. However it must at least be noted that s 58 is wide enough to enable the Minister to give the contemplated direction to recover water use charges made by the Minister to a water user association in an appropriate case.

[26] Counsel for the appellants sought to draw support from s 60 which, as he submitted, creates a real right in land in favour of the authority which imposes the water use charge which is recoverable from the owner of the land. His submission was that there is an inherent unlikelihood that so invasive a right would be created in favour of a voluntary association. (Although counsel did not make an equivalent submission in relation to the powers given by s 59(3), he might, with some justification, have done so.) Once again, however, the legislature has used the expression ‘the relevant water management institution’ in s 60(2), which persuades

one, contrary to counsel's initial submission, that the use of that expression in s 57(2) was not merely 'loose terminology'.

[27] Although the aggregate weight of counsel's submissions thus far might seem to favour the exclusion of a water user association from the ambit of s 57(2), I do not think the issue is clearly determinable on the basis on which he relies. Fortunately the legislature has not left the matter uncertain.

[28] Chapter 8 of the Act spells out the creation and powers of a water user association. Such a body may be established on the Minister's own initiative or after receiving a proposal containing the information required in s 91(1). Section 93 provides:

'(1) Schedule 5 contains a model constitution which may be used as a basis for drawing up and proposing a constitution for a proposed water user association.

. . .

(3) A constitution must also incorporate such other provisions as the Minister may reasonably require and must be adopted by the members of the association and approved by the Minister before it can exercise any powers or perform any duties.

(4) A constitution adopted by a water user association is binding on all its members.'

So here is the counter to the description of the association by counsel as a 'private voluntary association': On the contrary, the association is designed and regulated to serve the purposes of a 'water management institution' within the broader context of the national water resource strategy (see eg s 7), the statute and according to the terms of its constitution and, in so far as it adopts the provisions included in Schedule 5, carries the express imprimatur of the legislature. Paragraph 18 of the model constitution (which has been substantially incorporated into the constitution of the association) provides

‘(1) For the purpose of defraying any expenditure that the Management Committee has lawfully incurred or may lawfully incur in carrying out its functions and duties it may annually assess charges on members according to the pricing strategy for water use set by the Minister.

(2) The Management Committee may recover the charges assessed from either-

(a) the owners of the land concerned; or

(b) any person to whom water is supplied on the land.

(3) Whenever the Management Committee has assessed a charge, the Committee must prepare an assessment roll setting forth-

(a) the name of each member liable to pay charges;

(b) a description of the piece of land, which may be a specially delineated area, in respect of which the charge is assessed;

(c) the quantity of water or abstraction time period to which the member is entitled;

(d) the amount of the charge assessed;

(e) the date or dates on which payment is due and the amount due on each date; and

(f) the rate of interest payable on non-payment and the effective date of interest.

(4) A copy of the assessment roll must lie open for inspection in the office of the Association at all reasonable times by any member of the Association.’

There is thus express statutory authorisation for the assessment and recovery of water use charges based on the pricing strategy contemplated by s 56. The liability to pay is not limited to the water user but is extended to the owner of the land, an extension which explains the protection accorded by s 60(2). Counsel for the appellants attempted to persuade us that paragraph 18 conflicts with the generally ascertainable policy in favour of the authority of a catchment management agency and must therefore be interpreted in such a manner as to limit its scope to the domestic interests of the association, ie dams built privately and water supplied in terms of arrangements falling outside of the strategy. However he could identify no factual or statutory basis for such a distinction which plainly ignores the reality that the charges made and recovered under paragraph 18 include those which derive their life from the authority of s 56 and for the recovery of which s 57 makes provision.

[29] Section 94 of the Act provides

'(2) Schedule 4 (excluding item 4(3) of Part 1 of that Schedule) applies to a water user association as if-

(a) the water user association were an institution; and

(b) a member of the management committee were a director, within the meaning of that Schedule, except to the extent that the Minister may otherwise direct.'

Schedule 4 deals with the 'Management Institutions'. It is applied by s 79(2) to a catchment management agency and, as may be seen above, by s 94 (and 82(4), in a specific instance) to water user associations. Paragraph 21 requires the board of the institution to prepare regular business plans which must be submitted and approved by the Minister (paragraph 25) and which govern its future operations (paragraph 27). Paragraph 23 provides:

'Each business plan-

(a) . . .

(b) must outline the overall financial strategies for the institution including the setting of charges, borrowing, investment and purchasing and disposal strategies;

. . .'

Counsel for the appellant submitted that the charges referred to are not identified as 'water use charges' and may just as well relate to some other charge not covered by Chapter 5 of the Act. I cannot accept that submission. First, Chapter 5 sets out the financial provisions which are considered necessary in the context of the operation of all the water management institutions which the Act creates. Paragraphs 23 to 28 of Schedule 4 embody the structure of the institutional business planning by which the provisions of Chapter 5 are to be realised: there is an obvious correspondence between the two sets of provisions. Second, paragraphs 23 to 28 apply without distinction to catchment management agencies and to water user associations. If, as they must, the words 'including the setting of charges' in paragraph 23 include the setting of charges within the meaning of s 57 (by a catchment agency) then, logically,

they include an equivalent power in respect of a water user association, there being no other reference in the Act to any other category of charge.

[30] The conclusion to which one is inexorably driven is that, notwithstanding the trend of the policy and terms of certain sections relied on in isolation or without due regard to the effect of the whole, the legislature has made clear its intention to enable a water user association such as Impala to exercise the powers to make and recover water use charges as contemplated by ss 57 and 59 of the Act.

[31] There is therefore no merit in the additional ground which the association seeks to incorporate in its notice of appeal. The application for amendment of the notice of appeal is accordingly refused with costs. For the guidance of the Registrar on taxation it is noted that the argument on this issue consumed about one third of the full day taken up by argument in the appeal; the extent of preparation on this issue was probably rather less, say 20% of the total time spent in preparation.

Did the association comply with the prescriptions of ss 59(3) and (4) and, if not, what is the effect of not having done so?

[32] On 26 March 2004 this Court delivered judgment in *Impala*. Both counsel in this appeal relied on the judgment in support of their contentions on the merits of the present appeal.

[33] The debate centred largely on para 8 of the judgment in which Farlam JA said:

'Before purporting to act in terms of section 59(3) the appellant afforded the respondents the opportunity in terms of section 59(4) of making representations to it as to why the supply of water to their properties should not be restricted. It is of course clear that the procedure set forth in subsection (4) is not intended as a hearing on liability at which the water user is required to satisfy the water supplier that nothing is owed. Such liability must be either admitted or judicially

established. *This* hearing is intended to be premised on the water charge being unquestionably due, and to elicit explanation why the restriction should not be imposed.'

[34] The association's counsel submitted that this passage means that both parties should approach the opportunity to make and hear representations on the (unstated) premise that the liability was uncontested, irrespective of whether that was or was not the case. His interpretation leaves it open to the association, after it has heard the representations, to cut off or restrict the user's water supply (steps which it takes at the risk of a spoliation application by the user or owner) or to apply to court for authorisation to take the steps contemplated in s 59(3)(b) in which event the association will, in the course of the proceedings, and before being granted the order, be required to satisfy the court on a balance of probabilities that the water charge is due. That, counsel submitted, was precisely the procedure that the association had followed in the application which led to the present appeal. In the founding affidavit the association expressly recognised the onus to satisfy the court that the appellants were indebted to it, an onus which, counsel submitted, had been satisfied on the papers without the need for oral evidence. Counsel laid emphasis on the opening words of s 59(3), 'If a water use charge is not paid-'. He submitted that the simple failure to pay was all that was required before an association could invoke s 59(3)(b) subject to giving the owner or user the opportunity provided for in s 59(4). In that regard, he said, the fact that an association formed the opinion that a member was in default was sufficient to enable it to rely on the section. In the alternative, counsel for the association submitted, if the proper interpretation is not as he contended, then the *dicta* in paragraph 8 of the judgment are either obiter or wrong or are avoidable on both counts.

[35] Counsel for the farmers interpreted paragraph 8 rather differently: the clause 'premised on the water charge being unquestionably due' meant, he submitted, that

the liability is no longer in question (if it had ever been) by the time s 59(3) is invoked; that is why Farlam JA referred to the premise of 'unquestionable' liability existing at the time of the hearing of representations. Counsel also submitted that the *dicta* in question were part of the *ratio decidendi* of the judgment and were correct in substance.

[36] To resolve this dispute it is necessary to examine the internal logic of the judgment. Van der Reyden J in the High Court had decided the application upon the basis that it was for the association 'to show that its actions in interfering with the flow of water . . . fell strictly within the four corners of the authorising statute, and that, in order to be able to invoke its powers under s 59(3) of the Act, the [association] had to show that portion of the water charge withheld by the respondents was lawfully owing and payable'. On appeal in *Impala 1* counsel for the association argued that the court *a quo* had been wrong either because the onus rested on the water users to prove that its action in restricting the supply had been unlawful because it was not covered by s 59(3) and they had failed to discharge that onus, or because the association, if it bore the onus, had discharged it. (I leave aside the issue of possession of a right to use water, a matter not relevant to the present judgment.)

[37] When one identifies the substance of the issue, the structure of the judgment is easy enough to discern. Farlam JA dealt in paragraph 8 with the circumstances which give rise to a right in an association to act in terms of s 59(3). In paragraphs 9 and 10 he referred to the approach of the court *a quo* to the onus and the attack on it in the appeal. In paragraphs 11-17 he set out the respective submissions of counsel as to the correct application of the onus. In paragraphs 22 to 26 the learned judge discussed the legal principles bearing on the incidence of the onus, saying, almost *en* passant, in paragraph 22

'Applying this principle [ie that no man may take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with the principle] I agree with the judge *a quo* that section 59(3) can only be invoked when the water use charge the non-payment of which triggers the power to restrict the supply of water to a user is legally payable.'

Finally, in paragraph 27, Farlam JA held, first, that 'the onus to show that the portion of the water use charges not paid was legally due rested on the [association]' and, second, that the association had been unable to discharge that onus because liability to pay the unpaid portion was the subject of proceedings in another court and the association had consented to an order granting the user members leave to defend in those proceedings.

[38] From the aforegoing it is clear to me that Farlam JA made the remarks in paragraph 8 in anticipation of having to decide which party bore the onus and with a view to making clear precisely what was required to happen or exist before reliance could lawfully be placed on s 59(3). Having decided that the association bore the onus, he was then able, without further discussion, to explain why it had fallen short in the respects mentioned in paragraph 8. This is all of a piece. There can be no question of paragraph 8 being obiter.

[39] The next matter to be ascertained is what *Impala 1* decided which is of relevance to the present appeal. That one cannot do without first understanding the content of s 59(3). As counsel for the association conceded the subsection creates a draconian means of enforcing payment akin to execution. Moreover the 'execution' procedure provided is one which does not require or contemplate judicial sanction for the acts of the creditor. It was in this context that Farlam JA referred to interpreting the statute in a way which interferes as little as possible with the principle against self-help. In order to minimise such interference Farlam JA interpreted the section as only capable of being relied on ('invoked') when the unpaid charge 'is legally

payable' (para 22) (ie not merely 'payable'). That, as I understand the learned Judge, ties in with his earlier remark (in paragraph 8) that the hearing in s 59(4) is premised on the charge being 'unquestionably due' ie it has already been either admitted or judicially established. If the learned Judge had intended to leave open the possibility of proof in the event of future dispute, 'probably due' would have been the appropriate premise. 'Unquestionably due' means, according to my understanding, that there is no foreseeable possibility that it is not due or will in future be found to be so. Such a premise is consistent only with an unequivocal admission of liability to make payment or the possession of a final judgment in favour of the creditor.

[40] Counsel for the association submitted that 'a proper reading of *Impala 1* and the Act reveals that the position is as follows: When a water user is, *in the opinion of an association*, [my emphasis] a defaulter (ie one who has not paid a charge lawfully raised) it is open to the association, after it has allowed the member concerned to make representations, and if those representations do not persuade it otherwise, to restrict the supply of water to the member concerned.' But one cannot qualify the opening words of s 59(3) by the subjective opinion of the association because both ss (a) and (b) are triggered by the words 'is not paid' and both subsections posit a legally effective consequence ie the running of interest and the cutting off or restricting of the water supply and not an event which depends upon the correctness or otherwise of the opinion of one party.

[41] When therefore Farlam JA referred to an unquestionable premise he was not concerned with the expectations of the parties but with the intention of the legislature in regard to what must exist as an objective fact before representations can be called for in terms of s 59(4). That is also why he had no difficulty, having determined upon whom the onus lay, in finding in favour of the farmers: not because they had not paid the charges levied – that was common cause – but because the association had failed

to show that they had been legally obliged to pay at the time that the power to restrict the supply was exercised (paragraph 22).

[42] This interpretation is it seems to me the only one which fits the language and reasoning of the judgment. That it also accords with what I see as the plain purpose of the Act is merely confirmatory of its correctness.

[43] In summary: s 59(3) is coercive in its effect and enables the creditor to withhold or reduce the supply of water to its debtor until the debt has been paid. The provisions create a remedy which may be seriously invasive of a debtor's interest and the creditor who relies on them must show strict compliance with the statutory requirements. The structure of s 59(3) and (4) justifies the inference that the legislature intended that the fact and amount of the debt be admitted or judicially established before the subsections can be relied upon. That certainty as to the precise amount of the debt is necessary follows from the purpose and duration of the restriction: the debtor is entitled to restoration of the water supply as soon as he has paid the debt in full. The representation procedure for which s 59(4) provides must take place after the debt has been admitted or judicially established. That also follows from the structure of the section and the purpose of the provision: the representations are to be addressed to the fairness and propriety of cutting off or restricting the water supply not to liability. Plainly such representations may be unnecessary if the debt is either not admitted or cannot be proved; moreover the size of the debt must often have a bearing on the appropriateness of adopting the coercive procedure and the potential prejudice to the debtor of taking such steps.

[44] <u>The application of the terms of s 59(3) and (4) to the facts of this case</u>.

As I have noted earlier in this judgment the association applied for an order in the court *a quo* authorising it to make use of the execution provisions before the fact and

amount of the debt was established by admission or a court order. It relied on an ability to prove the debt in the very proceedings in which it claimed an order for execution of that debt. The statute does not permit of that procedure. An example of a notice sent in purported compliance with s 59(4) (to the trust represented by the first to fourth appellants) on 3 June 2003 reads as follows:

‘**INSAKE: KENNISGEWING KRAGTENS ARTIKEL 59(3) VAN DIE NASIONALE WATERWET NR. 36 VAN 1998 VOORGENOME INPERKING VAN WATERGEBRUIK**

U is tans agterstallig met die betaling van water gebruik vorderings aan die Impala Watergebruikersvereniging.

Besonderhede van die agterstallige vorderings is uiteengesit op die mees onlangse maandstaat wat aan u versend is. Vir u gerief heg ons hierby aan u rekening transaksie analises.

Die Impala Watergebruikersvereniging is van voorneme om, onderhewig aan wat hieronder uiteengesit is, die voorsiening van water aan u te beperk kragtens die bepalings van Artikel 59 van die Waterwet.

U aandag word gevestig op Artikel 59(3) tot (6) wat soos volg lees:

“3. Indien ‘n watergebruikvordering nie betaal is nie-

a. is rente betaalbaar gedurende die tydperk van versuim teen ‘n koers wat van tyd tot tyd deur die Minister, met die instemming van die Minister van Finansies, by kennisgewing in die Staatskoerant bepaal word: en

b. kan die voorsiening van water aan ‘n watergebruiker vanaf ‘n waterwerk of die magtiging om water te gebruik ingeperk of opgeskort word totdat die vorderings, tesame met die rente, betaal is.

4. ‘n Persoon moet ‘n geleentheid gebied word om, binne ‘n redelike tydperk, vertoë te rig ten aansien van enige voorgestelde inperking of opskorting voordat die inperking of opskorting opgelê word.

5. Waar daar ‘n vasgestelde vordering is, verlig ‘n inperking of opskorting nie ‘n persoon van die verpligting om die vordering wat vir die tydperk van die inperking of opskorting verskuldig is, te betaal nie.

6. ‘n Persoon wat se watergebruik om enige wettige rede ingeperk of opgeskort is, kan nie later die water opeis waartoe daardie persoon andersins gedurende die tydperk van inperking of opskorting geregtig sou gewees het nie.”

Dit is die voorneme van die Impala Watergebruikersvereniging om watergebruik aan u in te perk, deur slegs voorsiening te maak vir huishoudelike gebruik. Dit volg derhalwe dat watergebruik vir besproeiing en/of kommersiële boerdery en/of gebruik in totaal opgeskort word.

Kragtens die bepalings van Artikel 59(4) word u ‘n geleentheid gebied om binne veertien (14) kalender dae, bereken vanaf datum van betekening van hierdie kennisgewing, vertoë te rig ten aansien van die voorgestelde inperking en, in die besonder, waarom daar nie sodanige inperking moet wees nie. Indien u die bedrag verskuldig betwis, moet u ook die detail en die gronde waarop u verskuldigheid ontken, uiteensit.

Indien vertoë nie ontvang word kragtens die bepalings van Artikel 59(4) nie, is Impala van voornemens om die Hooggeregshof te nader om ‘n bevel wat Impala magtig om u watergebruik op te skort.

Indien vertoë ontvang word kragtens Artikel 59(4) en wel binne veertien (14) kalender dae vanaf betekening van hierdie kennisgewing, sal u nie later as vyf (5) kalender dae na verstryking van die veertien (14) dae periode, skriftelik verwittig word van die Impala Watergebruikersvereniging se beslissing. Indien u vertoë van die hand gewys word is Impala van voornemens om die Hooggeregshof te nader om ‘n bevel wat Impala magtig om u watergebruik op te skort.’

In the case of these particular farmers the association received a reply from their attorney in the following terms (dated 19 June 2003):

‘U skrywe gerig aan ons kliënt aangaande betaling van die beweerde agterstallige bedrag het betrekking.

U rig herhaaldelik ‘n skrywe aan ons kliënt ten opsigte van beweerde agterstallige bedrae, en kan u nou aanvaar dat ons kliënt se verweer reeds op rekord geplaas is, in die beëdigde verklaring in die aansoek waarop u voorheen gepoog het om ons kliënt se watergebruik/toevoer te sny en/of in te perk.

Ons kliënte is reeds op rekord by herhaalde geleenthede, wat hul verwere is, en die poging deur u om elke keer ‘n nuwe skrywe aan kliënte af te stuur en uit te nooi tot ‘n vertoë, alwetende dat kliënt reeds ‘n vertoë op rekord het, is deursigtig en klaarblyklik ‘n poging om die prosedure van die Wet te gebruik tot u eie voordeel, maar wetend dat ons kliënte ‘n verweer en vertoë het. Ons kliënte het reeds hulle verwere en vertoë op rekord geplaas by wyse van beëdigde verklarings asook by wyse

van inkorporasie van die sake van Vlok, Kruger en Schoeman, wat tans in die Hooggeregshof dien te Pietermaritzburg.

Ons versoek u dat u die vertoë, die verwere en die bewering wat daar in daardie sake onder eed voor die hof geplaas is, inkorporeer as ons kliënte se vertoë, wat hierby inbegrepe is.'

I have quoted this exchange to illustrate the fallacy of the association's submission that it was entitled to rely on proof of the respondent's indebtedness in the same proceedings in which it claimed a right to execute. The first to fourth respondents, who disputed their indebtedness to the association (and were known at all material times to do so), were under no obligation to respond to the invitation to make representations concerning the threatened execution and did not do so. The association nevertheless applied to court for leave to rely on s 59(3) without affording the appropriate opportunity for making meaningful representations. I do not suggest that all the respondents had made their dispute equally clear, but use this example to show the necessity of establishing the debt with certainty before invoking s 59(4) and seeking an order to authorise reliance on s 59(3). The response was also such as to leave no doubt that the farmers placed continued reliance on the defences set up in the pending proceedings (ie those to which Farlam JA refers in para 27 of the judgment in *Impala 1*) which inter alia denied the right of the association to recover the disputed portion of the dam costs from its members.

[45] The conclusion is that the association did not succeed in proving in the proceedings which culminated in this appeal that it had strictly followed the statutory procedures in relation to any of its alleged debtors. The application should therefore have been dismissed by the court *a quo*.

[46] Several other defences to the application were raised in the application and reargued in the appeal. It is in the interest of the parties that I should say something about one aspect.

The quantum of the indebtedness of the respondents

The association set out to prove the amounts of indebtedness attaching to each respondent. It relied upon information captured on a software accounting system known as a 'water administration system' ('WAS'). The association's chief executive officer deposed as follows concerning the procedure followed by the association

'

73.

The system is used to capture the water charges raised for a particular water year, for each member, on the basis that the annual water charge is captured monthly and is payable monthly in the last six months of the water year.

74.

Water charge instalments not paid timeously attract interest at 15.5% per annum. To avoid the confusion that could arise with the capture of interest on various instalments and the allocations of any payments received from a member, it was decided to transfer arrear instalments from the WAS programme and rather to capture them under separate Pastel programmes (Pastel 1, 2 or 3). Using the Pastel programmes, interest could be raised from time to time on arrear instalments.

75.

To avoid any confusion with the raising of interest on arrear charges which arise in different water years, it was decided to separate the arrear instalments in respect of water years as follows.

(a) All arrear instalments for the short water year 1st July 2001 to 28th February 2002 was transferred from WAS to Pastel programme number 1.

(b) The water instalments captured in the water year 1st March 2002 to 28th February 2003 were divided into two periods. The first period was in respect of arrear charges for June to August 2002. The second period was for arrear charges from September 2002 to December 2002.

(c) The arrear charges for the first period were transferred from WAS and captured on Pastel programme number 2. The arrear charges for the second period were transferred from WAS and captured in Pastel programme number 3. Most of the Respondents names were captured in all of the Pastel programmes. The determination of their total arrear charges would require extracting the information from WAS and from the three Pastel programmes.'

[47] The association attached to its founding affidavit schedules summarising the information on the programmes including details of capital charges and interest

accrued on such capital. As counsel for the farmers emphasised, the documentation is in the form of open accounts reflecting unexplained and unsubstantiated opening balances. There is no reason why such information may not be used for the purpose of establishing liability in a given case provided the information is reliable. In the present case the transference of information from one system to another and then into summary form was cumbersome and resulted in complicated tracking and interpretation. Counsel for the appellants drew our attention to inconsistencies which appeared to throw certain of the balances into doubt. It is unnecessary to go further than to point out that if a party wishes to prove an indebtedness on paper, without supplementary evidence, the facts and figures on which it relies should be readily explicable by counsel and capable of logical connection by the court, without mental gymnastics, for which judges are not qualified. This in my view the association failed to do. In the case of a water user association there is much to be said for the submission of counsel for the appellants that the association might be better advised to rely on the provisions in its constitution (which are also those contained in paragraph 18 of Schedule 5 to the Act) which as counsel said confers on a properly prepared assessment roll which has duly lain for inspection a value akin to a liquid document for the purposes of obtaining judgment against a member.

[48] For the reasons set out earlier in this judgment the appeal must succeed. The following order is made:

1. The application to amend the grounds of appeal is dismissed with costs including the costs of two counsel.
2. The appeal succeeds and the order of the court *a quo* (excluding para 4 thereof) is set aside and replaced by the following order:

   ‘The application is dismissed with costs including the costs of two counsel’.

3. Subject to paragraph 1 above, the respondent is to pay the costs of the appeal including the costs of two counsel.

J A HEHER
JUDGE OF APPEAL

BRAND JA:

[49] I have had the advantage of reading the judgment of my brother Heher. I agree with most of his reasoning as well as with the result that he proposes. There is, however, one aspect on which I find myself in respectful disagreement. Although our divergence of views will make no difference to the outcome in this appeal, it may be of substantial importance in the future application of s 59(3) and (4) of the Act.

[50] The ambit of our disagreement is delineated by Heher JA's conclusion (in para 43) that '[t]he representation procedure for which s 59(4) provides, must take place after the debt has been admitted or judicially established'. Succinctly stated, my contrary view is that although the requirements of both s 59(3) and 59(4) must be satisfied in order to justify the restriction of a debtor's water supply under s 59(3)(b), I am unable to infer the prescription of an order of proceedings found by Heher JA, – which requires the establishment of both the fact and the amount of the debt prior to the hearing in terms of s 59(4) – in either of the two subsections concerned.

[51] If Heher JA's conclusion is correct, it would mean that the association is compelled to seek a court order whenever the fact or quantum of the debtor's alleged liability is denied, however spurious or contrived the grounds for such denial may be. As is, with respect, correctly pointed out by Heher JA (in para 39), s 59(3) creates a mechanism of enforcing a debt without the requirement of judicial sanction. On his construction, judicial sanction can, however, only be avoided if the debtor admits liability. In the absence of such admission, the association will be compelled to seek judicial determination of the debt before the jurisdictional prerequisite of a s 59(4) hearing can be satisfied, with the resulting delay and period of grace for the defaulting debtor that it entails.

[52] As appears from Heher JA's judgment, he arrived at this conclusion of a prescribed order, essentially for two reasons: first, because this was held to be the position by this court in *Impala 1;* secondly, on the basis that it follows from the structure and purpose of the provisions of s 59(3) and (4). I respectfully find myself unpersuaded by either of these two considerations. I first deal with the purpose and structure of the provisions of the two subsections. In my view a proper reading of two subsections reveals the following: when a debtor is in the opinion of the association a defaulter in the sense of one who has not paid a water charge lawfully raised, it must allow the debtor to make representations. If those representations do not persuade the association otherwise, it would be entitled to restrict or suspend the water supply.

[53] If the debtor admits being in default, no question of seeking the sanction of the court arises. If the debtor disputes the association's claim, the latter has two courses of action open to it. First, it may proceed to exercise the statutory power under s 59(3), but it must be ready to ward off spoliation proceedings, and to discharge the onus which it will bear in those proceedings to establish both the fact and the amount of the debtor's alleged liability. Apart from a spoliation order, inability on the part of the association to discharge this onus may, of course, also give rise to a claim against it for the damages resulting from its unlawful action.

[54] The alternative and more cautious procedure would be to approach the court first, either in proceedings seeking an order for payment of the amount claimed, or in proceedings, such as those launched by the respondent in this matter, for an order sanctioning the restriction or suspension of the debtor's water supply under s 59(3). In the exercise of the latter option, the association must be prepared to establish the fact and quantum of the debtor's liability in motion proceedings.

[55] In any event, the association would have to afford the debtor the opportunity to make representations in terms of s 59(4) and then to consider those representations before it either decides to restrict the water supply of its own accord, or to seek a court order to that effect. However, if it decides not to adopt the option of first seeking an order for payment of the amount claimed, there is nothing, in my view, that precludes the association from inviting s 59(4) representations to be made on the supposition, assumption or premise that the amount claimed is due. The invitation would, of course, have to make it clear that the purpose of the proposed hearing is not to establish liability, but to elicit explanation why, on the supposition or premise that liability had been established, the restriction should not be imposed. A debtor who, in the light of this invitation elects not to make representations, but to rely solely on his denial of liability, will do so at his peril. If the association can prove the fact and the amount of his liability, either in spoliation proceedings or in the proceedings seeking authorisation to restrict the debtor's water supply, all the requirements for invoking the statutory powers bestowed upon it by s 59(3) will be met. No consideration derived from a construction of the Act, or of logic, in my view, dictates that a debtor who wrongfully disputes liability should be allowed a period of grace or an opportunity to delay the restriction of his water supply which is denied to a debtor who admits default. This would be the effect of the construction adopted by Heher JA.

[56] This brings me to the judgment in *Impala 1*. Heher JA derives a great deal of support for his conclusion from paragraph 8 of that judgment. If that paragraph does indeed support his conclusion, I would be in the rather invidious position of saying that part of a judgment that I have concurred in, is wrong. I am not persuaded, however, that there is anything in paragraph 8 which differs from what I believe to be the correct construction of s 59(3) and (4). Paragraph 8 is quoted fully by Heher JA (see para 33 above). What he finds particularly supportive of his view is the statement in the last sentence that:

'*This* hearing [prescribed by s 59(4)] is intended to be premised on the water charge being unquestionably due, and to elicit explanation why the restriction should not be imposed.'

[57] Heher JA's understanding of this sentence is that the water charge must be established either by admission or judicial determination before the 59(4) hearing can take place (para 39). If not, he says, reference would not have been made to 'unquestionably due' but rather to 'probably due'. I do not agree. That is not how I understand the statement by Farlam JA. What he says, in my view, is that since the 59(4) hearing is not intended as a hearing on liability, it must take place on the *premise* that liability has been established. That does not mean, however, that liability must first be established as a fact. On the contrary, if that is what Farlam JA had in mind he would not have referred to a 'premise'. What that term conveys is that if liability has not been established as a fact, the hearing can be based on the *premise* or the *hypothesis* that these charges are in fact due. So understood, the reference to 'unquestionably due', which Heher JA finds particularly revealing (in paras 39 and 41), adds very little to the present debate. All it means is that, for purposes of the hearing, the premise is not that the charges are 'probably due' but that they are due as a fact.

[58] Paragraph 8 must be understood in the context of the judgment in *Impala 1* as a whole and particularly in the light of paras 22 and 27 which read as follows:

'. . . I agree with the judge *a quo* that section 59(3) can only be invoked when the water use charge the non-payment of which triggers the power to restrict the supply of water to a user is legally payable. Indeed, I did not understand counsel for the appellant to dispute this proposition.'

And:

'In the circumstances it is clear that the onus to show that the portion of the water use charges not paid was legally due rested on the appellant. I cannot hold that it was discharged. As counsel for the respondents (correctly in my view) submitted, in view of the fact that the question as to whether the unpaid portion of water use charge is legally due by the respondents is the subject of other

proceedings in the court *a quo* and the appellant consented in its summary judgment application to an order giving the respondents concerned leave to defend, that question must be regarded for present purposes as an open one.'

[59] Thus it was common cause in *Impala 1* that the charges claimed had not been established, either by admission or judicial determination. *A fortiori*, there was no dispute that the 59(4) hearing had not taken place after both the fact and the amount of the debtors' liability had been established in either of these two ways. If Heher JA's understanding of para 8 is therefore to be accepted, the judgment would have ended immediately after the last sentence in paragraph 8. The question as to who bore the onus to prove liability or non-liability and whether that onus had been discharged, would not even have arisen. Otherwise stated, it is, in my view, evident from the judgment in *Impala 1* that had the association been able to prove in the spoliation proceedings, that the water charges claimed were legally due, the appeal against the spoliation order would have succeeded.

[60] I therefore agree that the appeal should succeed, not for the reasons held by Heher JA (in paras 32-45), but because I hold the view that on the facts more fully set out in paras 46 and 47, the respondent had failed to establish the quantum of the water charges on which it relied as the foundation for its application. As I have said, once the appellant opted for an enforcement order in terms of s 59(3)(b) instead of first seeking a judgment for payment of the water charges allegedly due, it shouldered the onus of establishing both the fact and the amount of each respondent's liability and, because it had failed to clear that hurdle, the court *a quo* should have dismissed its

application with costs. I therefore concur in the order proposed by Heher JA in para 48.

…….
F D J BRAND
JUDGE OF APPEAL

Howie P }
Scott JA } Concurred in the judgment of Brand JA
Van Heerden JA }