Lessons from Carolina

Acid mine drainage, access to water and intergovernmental relations

Federation for Sustainable Environment and Others v Minister of Water Affairs and Others (35672/12) [2012] ZAGPPHC 170 (15 August 2012)

Initiatives such as the national Blue Drop and Green Drop certification programmes indicate government's commitment to improving the quality of drinking water. However, while many municipalities have made progress, there are still problems in the supply and quality of drinking water, particularly in rural areas.

Residents' attempts in Mpumalanga to compel municipalities to provide a regular supply of safe drinking water were highlighted in three recent related High Court judgments.

The High Court (10 July)

On 10 July 2012, residents of Carolina, represented by the Federation for Sustainable Environment (FSE) and the Silobela Concerned Community (the applicants) approached the High Court to try to compel the respondents to provide a regular supply of safe drinking water. It is an established fact that acid mine drainage (AMD) has contaminated the water of many towns situated near mining activity, including Carolina. As respondents the applicants cited all those engaged in the delivery of water to their town, including the National Minister of Water Affairs, the provincial MEC for Water, Mpumalanga's MEC for Cooperative Governance and Traditional Affairs and, importantly, the Albert Luthuli local municipality (Albert Luthuli) and Gert Sibande district municipality (Gert Sibande). While section 84 of the Municipal Structures Act of 1998 designates district

municipalities as water service providers, the Minister for Local Government, in terms of section 83(3) of the Structures Act, had designated the local municipality, Albert Luthuli, as the primary water service provider.

The residents approached the court on an urgent basis requiring an order compelling the respondents to provide access to potable water, based on the municipalities' failure to comply with the minimum standard for basic water supply services (section 3(b)) of the regulations to the National Water Act 36 of 1998). The regulations stipulate a minimum of 25 litres of potable water per person per day, or 6 kilolitres per household per month. Importantly, they stipulate that consumers may not be without water for more than seven days per annum.

After Carolina's water was contaminated, the municipality provided access to clean drinking water through temporary water tanks, which the residents argued was inadequate. Some of the tanks were not refilled and residents were not made aware when they would be refilled, meaning that water was accessed on a 'first come, first served basis'. Some had to walk long distances to the tanks. In effect, some residents did not receive the basic supply of water guaranteed in the regulations.

The respondents, particularly the municipalities, argued that the water supply situation in Carolina was not urgent. They were aware of the situation and had invested much time and resources in trying to remedy it. They also alleged that residents had aggravated the problem by burning some of the water tanks in protest. Furthermore, the mines were responsible for the water problem in the first place.

The Court held that all the respondents were enjoined by the Constitution to take reasonable steps towards the progressive realisation of the residents' right of access to water. However, while the national and provincial government provided regulatory control and support to capacitate municipalities to fulfil their functions, the Court held that local government's role is to be the end provider of the service. Importantly, the Minister reiterated that national government was committed to 'provid[ing] the necessary financial assistance to the municipality' to resolve the matter.

The Court ordered Gert Sibande to comply with the regulations, provide temporary access to water within 72 hours of the court order and 'actively and meaningfully' engage the residents on the important details of how the water would be made available. The municipality was also ordered to report to the court within one month on the measures taken to implement the order.

The appeal (26 July)

Gert Sibande applied to the High Court for leave to appeal the decision on the basis that, as it is not the water service provider, it does not have the authority to take the necessary steps to fulfil the court's order. Albert Luthuli also argued that as the order was directed at Gert Sibande, it was not obliged to comply with the order or report to the Court on the measures taken do so.

In terms of the rules of court, any appeal of a court decision automatically suspends the order of the court until the appeal is finalised. In the normal course of events the order of the court to engage with the residents and to provide access to water within 72 hours would have been suspended.

However, residents' representatives made a special counter application, arguing that the situation's urgency warranted a deviation from the normal rules. The order of court should not be suspended pending the finalisation of the appeal.

In such a situation the Court must consider whether a deviation would cause irreparable harm to either party. It must consider the 'balance of hardship or convenience' to either of the parties. The Court held that in balancing the municipalities' arguments against the health risk posed to the community, it was necessary for the original order of court to be executed. Thus, while the court granted the municipalities leave to appeal the court order, it lifted the order's suspension through an interim execution order.

The appeal against the interim execution order (15 August)

On 7 August the municipalities appealed the interim execution order compelling them to deliver water to the residents on the grounds that the district was not the water service provider. The Court failed to make a decision on these arguments. It distinguished between the appeal against the original court order, and the interim execution order compelling the municipalities to provide water irrespective of the appeal. The Court held that the district and local municipality have a constitutional duty to deliver water to the residents, who had proved that irreparable harm could occur if they did not receive access to water. The Court also took into account that both the National Minister of and the MEC for Water Affairs were prepared to provide funding to resolve the matter. It thus held that any intergovernmental relations problems that the municipalities encountered in fulfilling their duties could be resolved at a 'political level'.

The Court therefore dismissed the application against the interim order.

Comment

In balancing the urgent needs of the residents the Court dealt with neither the complex division of powers and functions between the district and local municipality, nor the clear intergovernmental relations that accompany it. The municipalities will have an opportunity to address these issues on appeal. The judgment also failed to deal with the mines' liability. What is clear, however, is that Carolina's conditions are not unique, as shown by similar pending applications. All spheres of government responsible for the delivery of water must therefore formulate an appropriate response that ensures that the short-, medium- and long-terms needs of the residents of these towns are met.

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