

IN THE WATER TRIBUNAL

HELD AT PRETORIA

In the application between:-

CASE NO: WT 10/06/09

BURRUPS 17757

APPLICANT

and

**DEPARTMENT OF WATER AND ENVIRONMENTAL
AFFAIRS**

RESPONDENT

CONDONATION RULING

APPEARANCES :

Coram

: Mr. L.J Lekale (Chairperson)
Dr. W Singo (Deputy Chairperson)
Mr. H Thompson (Member)
Mr. A.S Makhanya (Member)
Mr. A.S Hadebe (Member)

FOR THE APPLICANT :

Mr. B. Kruger from Nel & Stevens Attorneys
of Greytown
Telephone No. (033) 413 1181
Telefax No. 086 600 7044

FOR THE RESPONDENT :

Mr. Andrew Seletisha from Respondent's Legal
Services Directorate – Pretoria.

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. An application for condonation of the late lodgment of an appeal against a directive was heard in Pretoria on the 3rd July 2009;
- 1.2. The applicant was represented by **Mr. B Kruger** from a firm of attorneys Nel & Stevens of Greytown while the respondent, on its part, was represented by **Mr. Andrew Seletisha** from its Legal Services Directorate in Pretoria.

2. ISSUE TO BE DECIDED:

- 2.1. The question to be determined was whether or not good cause existed for condonation of the late lodging of an appeal within the contemplation of item 5 (2) of Schedule 6 of the National Water Act (the Act) read with Rule 4(4) of the Water Tribunal rules;
- 2.2. In the event of the foregoing question being decided in the affirmative, the Tribunal was required to accept the appeal and to deal with it in terms of its appellate jurisdiction as provided by section 148 read with the provisions of Schedule 6 to the Act.

3. BACKGROUND TO THE ISSUE:

The respondent issued a directive against the applicant through its Acting Regional Director for Water Resource Management on the 3rd December 2007.

The applicant requested reasons for the said directive per a letter dated the 20th December 2007.

On the 10th June 2009 the applicant lodged an appeal against the said directive contending, inter alia, that it had not yet received a response to its request for reasons and, further, applying for condonation of the late lodging of the appeal.

There was no written response to the application by the respondent.

At the hearing of the application the respondent opposed the granting of condonation.

This is, therefore, a majority ruling on the application.

4. SURVEY OF EVIDENCE AND ARGUMENT:

No oral evidence was adduced. The parties made verbal submissions as follows:-

4.1. The applicant's submissions:

Mr. Kruger submitted to, inter alia, the following effect:

- (a) after receipt of the directive the applicant requested reasons for the same in terms of section 148 (3)(c) of the Act;
- (b) to date of the lodgment of the appeal no reasons had been received from the respondent;
- (c) the applicant lodged an appeal following an advice from one Mr. Blanchè of the respondent's Regional Office;
- (d) when the applicant bought the farm it was informed by the seller that there was a permit for the relevant afforestation but it, subsequently, turned out that the permit in question had expired;
- (e) the applicant was, therefore, not in reckless disregard of the law;
- (f) it appeared that the respondent was, in law, entitled to issue the relevant directive;
- (g) the respondent may, however, withdraw the directive on good cause shown;
- (h) the appeal was, in reality, not out of time insofar as the reasons had not yet been furnished.

4.2. The respondent's submissions:

Mr. Seletisha submitted to the following effect, among others:

- (a) the applicant effectively conceded that there existed no basis for the granting of the application insofar as Mr. Kruger admitted that the respondent was, in law, entitled to issue the directive in question;
- (b) the applicant enjoys no prospects of success in its appeal;
- (c) if the applicant requested reasons and the delay involved was attributable to that fact, then and only in that event, good reason existed for the delay.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The onus was generally on the applicant, as the one seeking indulgence, to prove that good reason existed for condonation.

The applicant, effectively, contended that the appeal was, in reality, not late insofar as the reasons for the directive had not yet been furnished.

The Tribunal was, however, satisfied that the appeal was lodged late insofar as:-

- (a) according to section 148(3) of the Act an appeal must be lodged within 30 (thirty) days of the last of the following events:-

- * publication of a decision in the Government Gazette;
 - * sending of the notice of a decision; and
 - * the furnishing of the reasons for a decision;
- (b) when the applicant requested the reasons for the directive it, effectively, postponed the running of the prescribed 30 (thirty) day period to a date after the furnishing of such reasons by the respondent;
- (c) when the applicant lodged the appeal before the requested reasons had been furnished it, in effect, abandoned the postponement with the result that the only remaining event which determines the running of the prescribed period became the date of the directive;
- (d) as at the 10th June 2009 when the appeal was lodged the same was some 525 days late.

It was, therefore, necessary for the Tribunal to determine whether or not good reason existed for condonation.

In determining the application the Tribunal had regard to the following in line with the decision in *Melane v Santam Insurance Co. Ltd* 1962(4) SA 531 (A):

- (a) **degree of lateness:** It was axiomatic that the appeal was excessively late.
- (b) **reason or explanation for the lateness:** The reason advanced for the delay was sufficient and acceptable insofar as the applicant was, in law, entitled to request the reasons for the administrative action taken by the respondent. Although the applicant relied on section 148 (3)(c) of the Act in its request for reasons, the Tribunal was satisfied that reference to the said section of the Act was, in law, reference to the **Promotion of Administrative Justice Act (PAJA)**. In this regard it should be noted that section 148 (3) (c) of the Act does not provide a vehicle for requesting reasons for directives or decisions but prescribes the events that trigger the running of the 30 (thirty) day period limited for lodging appeals. Section 42 of the Act, on its part, makes provision for applicants for licences to request reasons for decisions made on their licence applications.

Mr. Seletisha was in agreement that, where applicable, such an explanation was generally adequate and acceptable. He only disputed that the applicant, in fact, made a request for reasons. The Tribunal was, however, satisfied from the documents before it that such a request was made.

In the light of the foregoing finding the Tribunal was satisfied that the prospects of success passed muster and, as was found in *Melane v Santam Insurance Co. Ltd* (*supra*) the stronger the explanation for the delay the weaker the prospects of success need to be.


The Tribunal was, further, satisfied from Mr. Seletisha's submissions that the respondent would not be prejudiced in the conduct of its case on appeal if condonation was granted.

6. **RULING:**

6.1. In the premises the late lodgment of the appeal is hereby condoned;

6.2. The Registrar of the Water Tribunal shall, therefore, accept the appeal and schedule the same for a hearing in due course.

DATED AT WELKOM ON THIS 10th DAY OF JULY 2009.



L.J. LEKALE
(Chairperson)