

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 19/02/2009

In the appeal between:-

CAROLYN NICOLA SHEAR

APPELLANT

and

**THE REGIONAL HEAD:
GAUTENG REGION - DEPARTMENT
OF WATER AND ENVIRONMENTAL
AFFAIRS**

FIRST RESPONDENT

**THE DEPARTMENT OF WATER AND
ENVIRONMENTAL AFFAIRS**

SECOND RESPONDENT

**EYE OF AFRICA DEVELOPMENT
(PTY) LTD**

THIRD RESPONDENT

APPEAL RULING: DATE 2010-11-30

APPEARANCES

Coram : L.J Lekale (Mr) Chairperson
Mr. H Thompson – Member

For the Appellant : **Adv. G.I Hulley** instructed by Kees
Verhage – Attorneys of Germiston

For the First and Second
Respondents : **Mr. T.M Sedibe** from the 2nd
Respondent's Legal Services
Directorate in Pretoria

For the Third Respondent : **Adv. R Stockwell SC** appearing with
Adv. E Van Vuuren instructed by
Werkmans Inc. – Attorneys of Sandton

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 16th November 2010.
- [2] The appellant was represented by **Adv. G.I Hulley** instructed by Messrs. Kees Verhage – Attorneys of Germiston.
- [3] The First and Second Respondents, on their part, were represented by **Mr. T.M Sedibe** from the Second Respondent's Legal Services Directorate – Pretoria.
- [4] The Third Respondent, on the other hand, was represented by **Adv. R Stockwell SC**, appearing with **Adv. Van Vuuren** and instructed by Werkmans Inc. - Attorneys of Sandton.
- [5] The proceedings were recorded mechanically and digitally by the Registrar of the Tribunal.

ISSUE TO BE DECIDED:

- [6] The preliminary question raised by the Tribunal of own accord is whether or not the appellant has **locus standi** to lodge an appeal in terms of section 148(1)(f) of the National Water Act (the NWA).
- [7] In the event of the foregoing question being decided in the affirmative, the next enquiry, to be undertaken at a future date, is whether or not the Third Respondent is entitled to a water use licence which it successfully applied for in terms of section 40 read with section 41 of the NWA.

BACKGROUND TO THE ISSUE:

- [8] The Third Respondent applied for a water use licence in June 2007 and the licence was, eventually granted on the 16th January 2009 after several interactions with, inter alia, its neighbours who were opposed to the application.

- [9] The appellant is the owner of a property which is situated adjacent to and abuts the property owned by the Third Respondent and in respect of which the water use licence was issued.
- [10] The appellant signed the appeal on or about the 23rd January 2009 and same was received by the office of the Registrar on the 19th February 2009. The Second Respondent, on its part, furnished documents, on which its decision to grant the licence is based, on the 24th March 2009 whereafter the appellant delivered an amended notice of appeal on the 14th April 2009.
- [11] The matter was, eventually, scheduled for hearing on the 15th September 2010. On that occasion the Water Tribunal raised a point in limine relating to **locus standi in judicio** mero motu and effectively required the parties to address it on the same at the next sitting viz. the 16th November 2010.

SURVEY OF EVIDENCE AND ARGUMENT:

- [12] No oral evidence was adduced and the following documents served before the Tribunal:
- [12.1] The bundle of documents made available, inter alia, by the parties and indexed by the appellant party;
- [12.2] Exhibit "A" : Copy of a letter from Werkmans Inc. to Kees Verhage – Attorneys dated 02-11-2010;
- [12.3] Exhibit "B" : Copy of a letter from Kees Verhage – Attorneys to Werkmans Inc. dated the 9th November 2010;
- [12.4] The appellant's Heads of Argument.
- [13] **Adv. Hulley** submitted to, inter alia, the following effect:

- [13.1] the question which arises is whether or not the appellant falls within the class of **"any other person who has timeously lodged a written objection against the application"** and if not, whether the appellant is thereby prevented from lodging an appeal;
- [13.2] a licence application was signed on behalf of the Third Respondent on the 4th June 2006;
- [13.3] a favourable decision on the said application was conveyed to the Third Respondent by the Second Respondent on the 23rd August 2006 without any advertisement having been required by the Second Respondent before such a decision could be taken;
- [13.4] from communication addressed by the Second Respondent to the Third Respondent's agent dated the 7th March 2007 it appears that an application for abstraction of water from a borehole was made by the Third Respondent;
- [13.5] in the said letter of the 7th March 2007 the Second Respondent required the Third Respondent to place an advertisement in local newspapers outlining the application and inviting public comments;
- [13.6] no time period for the lodgement of objections was specified and no such advertisement was ever placed in a local newspaper with the Third Respondent relying on an irrelevant advertisement placed in The Citizen on the 14th June 2004 in respect of an Environmental Impact Assessment Study undertaken by Seaton Thompson & Associates on behalf of the Third Respondent;
- [13.7] nevertheless the appellant submitted a written objection to the Second Respondent on the 6th June 2007 after learning about the application at a community meeting convened after one Ms. Belinda Martin had acquired knowledge of the application;

- [13.8] in a letter dated the 12th June 2007 and addressed by the Second Respondent to the Third Respondent's agent the former apparently accepted the said irrelevant advertisement as compliance with its directive of the 7th March 2007;
- [13.9] in September 2008 the appellant received information that the application in question was being considered and once again submitted a written objection dated the 22nd September 2008;
- [13.10] the plain grammatical meaning of section 148(1)(f) of the NWA leads to an absurdity insofar as it would mean that where no public notice was required by the responsible authority or where such notice was required but was not complied with and enforced, a party who would otherwise have objected to the application could thereby be disenfranchised;
- [13.11] the use of the word "may" in section 41(4) of the NWA is used in a permissive sense to mean that a responsible authority is entitled to require an applicant to comply with the public notice provisions "at any stage of the application process";
- [13.12] the said provision does not give the responsible authority the discretion to dispense with the requirements of section 41(4) of the NWA with regard to the placing of a notice in the media;
- [13.13] the stipulation in section 148 (1) (f) to the effect that only such persons as have lodged an objection timeously are permitted to also lodge an appeal must be seen in the same light in which the statutory provisions relating to procurement of goods and services by municipalities were seen by the Supreme Court of Appeal in **Municipal Manager: Quakeni Local Municipality and Ano. v FV General Trading CC 2010 (1) SA 356 (SCA)**;

[13.14] in the light of the foregoing and even if the appellant were to be found not to have lodged an objection as contemplated by section 148(1) (f) she is still entitled to appeal.

[14] **Mr Sedibe** for the First and Second Respondents reiterated that his clients do not contend lack of **locus standi** on the part of the appellant.

[15] **Adv. Stockwell** for the Third Respondent contended to, inter alia, the following effect:

[15.1] it is not apparent **ex facie** the Notice of Appeal that the appellant has an interest in the matter and without demonstration of the same it cannot be said to be clothed with **locus standi**;

[15.2] section 41(4) of the NWA clearly gives the responsible authority a discretion to require publication of a notice in the media;

[15.3] if it is found that the appellant has the necessary locus standi to lodge an appeal, the Third Respondent desires a directive to be given to the appellant to allow it access to her borehole in line with the request set out in Exhibit "A".

[15.4] he is not certain that the Tribunal has the power to issue such a directive but, in his view, the Tribunal may still make a recommendation if it does not have such a power.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[16] The onus is on the appellant to prove, on a balance of probabilities, that she has the necessary right to launch the current proceedings.

[17] In both her **Notice of Appeal** and **Amended Notice of Appeal** the appellant effectively contends that no notice was published in the media inviting objections.

- [18] The parties are effectively **ad idem** on the plain grammatical meaning of the relevant provision in section 148(1) (f) which extends the right to lodge an appeal with the Tribunal to **“any other person who has timeously lodged a written objection against the application.”**
- [19] The parties are, however, effectively at variance over whether or not in the circumstances of the present matter the Tribunal can, in law, depart from the ordinary meaning of the relevant provision on the basis that it leads to an absurdity which could not have been intended by the legislature.
- [20] In his contention that the appellant lodged an objection within the contemplation of section 148(1) (f) because no time frames were stipulated in the notice required by the Second Respondent, Adv. Hulley maintains that the objection in question does not have to be preceded by a publication of a notice envisaged by section 41(4) of the NWA.
- [21] In the Tribunal's view and as was found in the appeal between **Gideon Anderson t/a Zonnebloem Boerdery and Vuna Enterprises (Pty) Ltd** as second respondent, a close scrutiny of the relevant section and the whole appeal scheme of the NWA reveals that what is envisaged is the following:
- [21.1] appeals may only be lodged by the persons mentioned in section 148(1) of NWA;
- [21.2] in the case of section 148(1)(f) of NWA those who may appeal are the aggrieved applicant for a licence made in terms of section 41 of NWA or to which section 41 of NWA applies and any person who lodged a written objection against such an application timeously;
- [21.3] the time period for lodging written objections against section 41 licence applications is determined by the applicant for such a licence in a suitable notice published in newspapers and other media inviting objections;
- (see section 41(4) of NWA)
- [21.4] such a notice inviting objections can only be given by the applicant if required to do so by the responsible authority;

- [21.5] NWA does not define the word **“timeously”** and such a word is only used in relation to an **“objection”** in section 148(1)(f) while section 41(4) gives an applicant the power to determine the relevant time period within which objections may be made subject to certain timeframes;
- [21.6] reference to **“timeously lodged”** indicates that an objection contemplated by section 148(1)(f) should always be made within a pre-determined or prescribed time period;
- [21.7] only section 148(1)(f) bestows the right to appeal to an objector. All other sub-sections of section 148(1) refer to **“affected persons”**;
- [21.8] section 148(1)(f) extends the right to appeal to any person who has objected timeously and in writing to an application made **“under section 41, or any other application to which section 41 applies”**;
- [21.9] reference to **“application”** in the phrase **“or by any other person who has timeously lodged a written objection against the application”** is reference to an application made under section 41 or any other application to which section 41 applies;
- [21.10] section 41(4) deals with objections and, as such, only section 41 and no other section of NWA grants the right to object against an application under certain circumstances;
- [21.11] section 148(1)(f) should be read with section 41(4) for the purposes of identifying the objector contemplated therein;
- [21.12] an objection contemplated by section 148(1)(f) of NWA should always be preceded by a notice inviting objections and prescribing the time period within which such objections may be lodged.
- [22] In the present matter no written objections were invited and subsequently made in response to such an invitation as contemplated by section 41(4) of NWA. The right to appeal against the Second Respondent's decision on a section 41 application made by the Third Respondent, therefore, did not arise in favour of any objector.

- [23] Although the parties generally appear to be in agreement or do not dispute that the appellant was an objector, she was, in the Tribunal's view, not an objector contemplated by section 148(1)(f) of NWA.
- [24] The Tribunal, as a creature of statute, exercises sporadic as opposed to inherent jurisdiction. It can, as such, only do that which its enabling Act authorises it to do. It can, therefore, only entertain appeals lodged by those on whom the NWA confers the right to appeal to it as an appellate body.
- [25] Where a party feels aggrieved by a decision and / or the manner in which a decision was made by the responsible authority and such a party does not have the right to appeal to the Water Tribunal against such a decision, such a party, in the Tribunal's view, is free to explore other legal avenues available to her such as having recourse to the High Court.
- [26] It follows from the above that where a party in the position of the appellant is not entitled, as of right, to approach the Water Tribunal by way of an appeal, she is not without a remedy and the ordinary meaning of the relevant section does, therefore, not lead to an absurdity. It is, in the Tribunal's view, the intention of the legislature, in section 148(1) (f) of the NWA, to limit the right to appeal to only the aggrieved applicants and those who have lodged written objections timeously. Other interested parties may pursue other avenues open to them.
- [27] The appellant is, therefore, **ipso facto** non-suited for the purposes of appealing to the Water Tribunal in terms of section 148(1) (f) of the NWA.

RULING:

- [28] In the result the appellant lacks locus standi to lodge an appeal with the Water Tribunal in terms of section 148(1) (f) of the NWA.
- [29] The file shall, therefore, be closed.



L.J. LEKALE
(Chairperson)

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