

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT28/08/2006

In the matter between:

CHAMPAGNE FALLS (PTY) LIMITED

APPELLANT

and

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

CONDONATION RULING : DATE 08-04-2009

APPEARANCES:

Coram : Mr. L.J LEKALE (Chairperson)
Dr. W Singo (Deputy Chairperson)
Mr. Hubert Thompson (Member)
Mr. A.S Makhanya (Member)

For the Appellant : Adv. J.H.A Saunders
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For the Respondent : Mr. L Mtshotshisa
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1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. The appeal hearing was scheduled to take place in Pretoria on the 13th March 2009;
- 1.2. The appellant was represented by **Adv. JHA Saunders** while the respondent, on its part, was represented by **Mr. L Mtshotshisa** from its Legal Directorate;
- 1.3. At the commencement of the proceedings it became apparent that the appeal was lodged outside the 30 (thirty) day period prescribed by section 148(3) of the National Water Act (the Act) read with the provisions of Rule 4 of the Water Tribunal rules;
- 1.4. The appellant was, thus, required to apply for condonation of the late lodgement of the appeal;
- 1.5. This is, therefore, unanimous ruling on the condonation application.

2. ISSUE TO BE DECIDED:

- 2.1. The preliminary issue which was effectively raised by the appellant party in its Heads of Argument was whether or not, having regard to page 140 of the bundle prepared by the Registrar of the Tribunal, there was an undetermined application for condonation before the Tribunal;
- 2.2. In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not good reason existed for condonation of the late lodging of the appeal.

3. BACKGROUND TO THE ISSUE:

On the 15th June 2006 the respondent issued a directive against the appellant in terms of section 53(1) of the Act.

On the 2nd August 2006 the appellant lodged an appeal against the directive together with an application for condonation of the late lodging of the same.

On the 21st August 2006 the respondent unequivocally intimated in writing that it had no objection to the granting of condonation.

On the 25th August 2006 the Water Tribunal Officer advised the appellant in writing that the chairperson of the Tribunal had approved the application for condonation in view of the fact that the respondent had no objection to the application.

At the commencement of the hearing on the 13th March 2009 the respondent's representative withdrew the letter of the 21st August 2006 and announced that the respondent was, in fact, opposing the application for condonation.

The parties, thereafter, eventually agreed to submit written submissions with the respondent, further, being allowed to reply to any submissions made by the appellant party if it so wished.

4. **SURVEY OF EVIDENCE AND ARGUMENT:**

No evidence was adduced. The parties delivered written submissions as agreed.

4.1. **Appellant's submissions:**

Adv. Saunders submitted to, inter alia, the following effect:

- (a) that condonation was granted by the chairperson of the Tribunal as per a letter dated the 25th August 2006 and the decision was duly communicated to the appellant's attorneys of record;
- (b) that the Tribunal was, thus, **functus officio** in that the application for condonation had already been adjudicated upon;
- (c) that the withdrawal of a letter from the respondent dated the 21st August 2006 was of no force and effect because the purported withdrawal took place after the fact of condonation;
- (d) that the Tribunal cannot review its own decisions;
- (e) that there was, therefore, no application for condonation before the Tribunal;
- (f) that in the event of the Tribunal finding that it might still hear the condonation application, then and only in that event, the appellant submits that good cause exists for condonation insofar as:
 - the directive was not served personally on the appellant but was sent per registered mail;
 - the appeal enjoys good prospects of success;
 - there was no apparent prejudice to the respondent.

4.2. **The Respondent's submissions:**

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

- (a) the appellant was advised in the relevant directive to appeal against the same if it so wished within 30 (thirty) days;
- (b) failure by the appellant to visit its chosen address was of its own making and design;

- (c) there existed no good cause for condonation insofar as the delay involved was inordinate and the explanation tendered for the same did not hold water;
- (d) the application should be dismissed.

5. **ANALYSIS OF EVIDENCE AND ARGUMENT:**

The onus was on the appellant, as the applicant for condonation, to:

- * firstly prove that the issue of condonation was **res judicata** in that it had already been adjudicated upon and determined; and
- * secondly and only in the event of failure to discharge the onus in respect of the issue of **res judicata**, prove that good reason existed for condonation within the contemplation of item 5 (2) of Schedule 6 of the Act read with Rule 4(4) of the Water Tribunal rules.

Although the respondent was given leave to reply to the appellant's submissions no such reply was received from the respondent.

It was, thus, not disputed that, in terms of a letter from the Water Tribunal officer dated the 25th August 2006 the chairperson of the Tribunal condoned the late lodgement of the appeal.

The appellant's point **in limine** was effectively that the issue of condonation was **res judicata**.

The question, for the purposes of the Tribunal, was whether or not the said letter from the Tribunal Officer constituted the decision of the Tribunal. The foregoing prevailed because:

- * item 9(1) of Schedule 6 to the Act read with Rule 15 of the Water Tribunal rules requires the decision of the Tribunal to be in writing;
- * item 5(2) of Schedule 6 to the Act read with Rule 4(4) of the Tribunal rules bestows the power to condone late appeals on the Tribunal.

When all was said and done the Tribunal was satisfied, on the balance of probabilities and applicable law, that:

- * the acts and omissions of the chairperson and / or any member of the Water Tribunal performed in good faith and in the course of his or her duties as a member of the Tribunal are attributable to the Tribunal and are, as such, the acts and omissions of the Tribunal (see generally section 147 (4) of the Act);
- * according to item 6 (1) of Schedule 6 to the Act an appeal or application before the Tribunal must be heard by one or more members, as the chairperson may determine;
- * although item 9(1) of Schedule 6 to the Act as read with Rule 15 of the Water Tribunal rules requires the decisions of the Tribunal to be in writing, it does not prescribe the form which such decisions should take, nor does it require the decisions to be signed by the members of the Tribunal;

- * there was nothing before the Tribunal to suggest that the Water Tribunal Officer did not have the mandate of the chairperson to issue the letter in question;
- * the said letter implied that the application for condonation served before the chairperson of the Tribunal, who considered it against the respondent's attitude as set out in its letter of the 21st August 2006, and granted condonation;
- * the chairperson, therefore, made a decision which is attributable to the Tribunal;
- * as correctly contended for the appellant, the Tribunal could not review its own decisions because it was **functus officio**;
- * the decision by the chairperson was on the relevant condonation application and effectively signifies that the issue of condonation is **res judicata** in that it has been determined or adjudicated upon.

Even if the Tribunal was wrong in the foregoing findings, the Tribunal was satisfied that good reason existed for condonation because, inter alia, the submissions made for the appellant were not effectively gainsaid by the respondent party insofar as no reply was received from it.

6. RULING:

- 6.1. There was no undetermined application for condonation before the Tribunal;
- 6.2. The appeal shall, therefore, be rescheduled for a hearing in due course and the parties shall be notified of the date, time and venue of the hearing.



L.J LEKALE (Chairperson)