IN THE WATER TRIBUNAL

[HELD AT PRETORIA]

Case No: WT 03/06/10

In the matter between:

ESCARPMENT ENVIRONMENT PROTECTION GROUP	First Appellant
WONDERFONTEIN ENVIRONMENTAL COMMITTEE	Second Appellant
and	
DEPARTMENT OF WATER AND SANITATION	First Respondent
EXXARO COAL (PTY) LTD	Second Respondent

AND

Case No: WT24/2009

In the matter between:

ESCARPMENT ENVIRONMENT PROTECTION GROUP	First Appellant
WONDERFONTEIN COMMUNITY ASSOCIATION	Second Appellant
and	
DEPARTMENT OF WATER AND SANITATION	First Respondent
XSTRATA ALLOYS (PTY) LTD	Second Respondent

AND

Case No: 25/11/2009

In the matter between:

ESCARPMENT ENVIRONMENT PROTECTION GROUP	First Appellant
LANGKLOOF ENVIRONMENTAL COMMITTEE	Second Appellant
And	
DEPARTMENT OF WATER AND SANITATION	First Respondent
WER MINING(PTY) LTD	Second Respondent

RULING ON THE PRELIMINARY ISSUE: WHETHER The APPEAL HAS BECOME MOOT

Introduction and background

[1] This ruling is with regard to the appeal under case numbers WT 03/03/10 and WT 24/2009. The respondents in the former filed supplementary papers and participated in the hearing. The latter indicated that it would abide the decision of the Water Tribunal (Tribunal). The circumstances will become clearer hereunder.

[2] The circumstances leading to the hearing of the preliminary issue are captured in the Directives that I issued dated 26 May 2017. I deem it necessary to reproduce them ;

> ***INTRODUCTION***
>
> *[1] As indicated in my letter dated 16 May 2017 (copy attached) , the erstwhile Water Tribunal dismissed the three appeals on the basis that the appellants lacked locust standi to institute the appeals and other procedural omissions. The appellants instituted High Court proceedings to challenge the decisions.*
>
> *The appeals were consolidated and heard as one and a decision in this regard was issued in the judgment dated 18 November 2013 (attached to my letter above). The appeals were upheld.*
>
> *On recent enquiry from the representatives of the appellants, and upon perusing the contents of the files, I requested a meeting with all parties in the appeals for purposes of discussing, amongst other issues, filing of further documents and other logistics for hearing of the appeals.*

[2] I subsequently received a response from the legal representatives of Exxaro Coal (Pty) Ltd by letter dated 24 May 2017, in which they stated, amongst other things that after the judgment of the High Court and since there was no functional Tribunal when the matter was referred back, its client made representations to the Minister in terms of Section148 (2)(b) of the National Water Act, No.36 of 1998 to uplift the suspension of operations caused by noting of the appeal. The suspension was duly uplifted and its client has been carrying on with its operations which are expected to cease "during the first quarter of 2018".

A submission was made to me in this regard that " a hearing of this matter by the Water Tribunal will not only be academic but it would also have no practical effect or result".

[3] The meeting that I requested took place on 25 May 2017 at High Court Chambers and was attended by legal representatives of the Appellants and Water Use Licence holders in case numbers WT 03/06/10 ("Exxaro") and WT 24/2009 (" Xstrata").

There was no representation for the Department of Water and Sanitation and the water use licence holder in the appeal under case number 25/11/2009 (" Wer Mining").

ISSUES

[4] The parties were in agreement that the appeals should be set down for hearing; however, the issues ("the Preliminary Issue") raised in the letter of 25 May 2017 dominated the discussions.

[4.1] The representatives of Xstrata indicated that their client aligns itself with the views expressed by Exxaro and

that it too intended to raise the point that the hearing of the appeal would be academic.

[4.2] The representatives of the appellants indicated that a copy of the letter that was directed to me by representatives of Exxaro as indicated above was only made available to them that morning and they still had to apply their mind to the issues raised.
They agreed though that the Preliminary Issue should be ventilated and a decision be made.

[4.3] There was however no consensus with regard to whether the Preliminary Issue should be separated and heard first or at the same time with the merits of the appeal.

[4.4] After extensive deliberations, it was agreed that the Preliminary Issue should be heard first and a determination thereof be made.
In this regard, the parties agreed on timeframes within which documents pertaining to the Preliminary Issue should be filed and the date of hearing.

DIRECTIVES

[5] These Directives are directed at the parties in the appeals under case numbers WT03/06/2010 and WT24/2009 only.
As agreed between the parties during the meeting held as indicated above, the following Directives are hereby issued;

[5.1] The second respondents in the appeals under case numbers WT03/06/2010 and WT24/2009 (Exxaro and

*Xstrata) are directed to file their Supplementary Affidavits in the appeal on or before **30 June 2017**, and substantiate, in detail, and with reference to relevant evidence that includes, but not limited to ; documents, diagrams and opinions with regard to their submission that hearing of the appeal at this stage will not only be academic but it would also have no practical effect or result";*

*[5.2] The appellants (Escarpment Environmental Protection Group) and the first respondent (Department of Water and Sanitation) are directed to file their answering affidavits on or before **10 July 2017**;*

*[5.3] The second respondents, should they be so advised, are directed to file their replying affidavits on or before **14 July 207**;*

*[5.4] The parties are directed to file their respective heads of argument on or before **21 July 2017** ;*

*[5.5] The Appeal Panel will convene on **27 July 2017** to consider the Preliminary Issue.*
A notice of set down in terms of Rule 5 will be issued and served on the parties simultaneously with these Directives.

Compliance with the directives and subsequent action

[3] Subsequent to issuing of the Directives, the Tribunal received a letter dated 31 May 2017 from MalanScholes Attorneys , advising that they act on behalf of Muhanga Mines (Pty) Ltd, previously Werm Mining (Pty) Ltd (second respondent in appeal number 25/11/2009). They indicated that the Water Use Licence (WUL) awarded to their client on

24 October 2008 has lapsed. The letter went on to state that *'Muhanga no longer has an active interest in the matter. Muhanga , accordingly requests that the Water Tribunal both- excuse Muhanga's absence from the proposed Case Management Meeting; and remove Muhanga as a party from the corresponding appeal which we understand will be before the Water Tribunal at a future date'.*

[4] On 06 June 2017, the Tribunal received a letter from the LRC, objecting to the contents of the letter from Malanscholes with regard to the mootness of the appeal. LRC expressed a view that the appeal of Werm / Muhanga is similarly situated as the appeal in the other matters in the Directives above and the alleged mootness should be properly ventilated by way of exchange of pleadings and a hearing before the Tribunal.
They proposed dates for filing of supplementary documents.

[5] On 28 June the Tribunal received a letter from Hogan Lovells, advising that they act for the second respondent in the appeal under case number WT24/2009. The view expressed in the letter is slightly different from the sentiments expressed by the legal representatives in the Case Management meeting as recorded in the Directives above.

[5.1] The letter confirmed their view that the appeal is moot on the basis that the 'extraction operations at the Onverdacht Colliery ceased approximately two years ago'.

[5.2] Where the letter differs with the sentiments expressed in the meeting is with regard to their stance on the proceedings pertaining to the mootness of the appeal.

[5.3] In the letter they advised that their client would 'abide by the decision of the Water Tribunal both in relation to what has been referred to as the *"preliminary issue", and the appeal, on its merits, but Glencore reserves its rights to address an award of the Water Tribunal in the event that an award by the Water Tribunal includes any award which requires Glencore to conduct any activities in relation to the water use licence and /or places onerous obligations on Glencore'* .

[6] The representatives of the appellants (LRC) have not raised any objection (to the knowledge of the Tribunal) on the sentiments expressed by Hogan Lovells with regard to the mootness of the appeal under case number WT24/2009.

[7] The second respondent (Exxaro Coal (Pty) Ltd in the appeal under case number WT03/06/10 filed its supplementary affidavit as directed in paragraph [5.1] of the Directives.
However, I must state from the outset that, save for the say-so of the deponent, the affidavit did not address the issues contemplated in paragraph [5.1] of the Directives.

[7.1] The appellants filed their answering affidavit, and thereafter the second respondent replied in terms of paragraphs [5.2] and [5.3] respectively.

[7.2] The hearing took place on 27 July 2017.

The delay in issuing this ruling

[8] Subsequent to the hearing, and in view of the objections and insistence by LRC that the alleged mootness of the appeal in case number WT 25/11/2009 be ventilated by exchange of pleadings and in

a hearing, the Tribunal Chairperson engaged both the representatives of the appellants (LRC) and second respondent (MalanScholes) in case number WT 25/11/2009 with a view to arrange dates for a hearing.

[9] The Tribunal received a letter from LRC dated 17 August 2017 that reads in part as follows;

> *'2. The purpose of this letter is to inquire on the third matter (case nr. 25/11/2009). To date our client has not received any communication from the Water Tribunal concerning the Wer Mining matter.*
>
> *3. My client has indicated that Wer / Muhanga Mining operations have ceased. As a result the matter might be moot or have no practical effect'.*

[10] Of course, the assertion in paragraph 2 of the LRC letter was not correct. Paragraph 3 was rather strange in view of the previous correspondence and insistence that the matter was not moot.

[11] The Chairperson of the Tribunal directed an email to LRC to respond to this latest communication.

[11.1] The email dated 23 August 2017 reads as follows:

'Good day ALL,

> *1. I refer to the letter from the LRC dated 17 August 2017 that in my view appears to contradict an earlier one dated 06 June 2017 (both attached herein)*
>
> *2. Please refer to the attached email trail with regard*

to this matter, particularly my email dated 24 July 2017, which none of the parties has replied to.

3. Werm/ Muhanga's attorneys contend that the appeal has become academic (letter dated 31 May 2017) . The LRC's position in this regard (in its letter of 06 June 2017) appear to be different from what is stated in paragraph 3 of the letter of 17 August 2017.

4. Kindly indicate whether the appellants have changed their stance with regard to the alleged mootness of the appeal , and if so, they must please indicate what their intentions are.
Thank you.
Adv. Nana Makhubele SC

[11.2] The email dated 24 July 2017 reads as follows;

'Good day ALL.
I am finalizing Directives and constitution of a Panel.
Kindly indicate your availability in one of the dates in the following weeks:
21 - 25 August 2017
25 - 29 September 2017
Thank you.
Nana Makhubele SC
Chairperson

[12] Ultimately, and as there was no clarity with regard to the stance of the appellant on the matter, the Chairperson constituted the same panel to hear the argument on the Preliminary Issue in as far as it

pertains to the mootness of the appeal against the second respondent (Werm/Muhanga) under number WT 03/04/10.
The hearing was set down for t06 December 2017 . The parties were given the following Directives;

> *'Parties must file written submissions on the preliminary issue:*
> *Werm: 03/11/17*
> *Appellants: 17/11/17*
> *Reply: 24/11/17'*

[13] Subsequent to the Notice of setdown and Directives as indicated above, the Tribunal received a Notice of withdrawal dated 07 November 2017 from LRC . The Notice simply states that *'the first and second appellants hereby withdraw their appeal in the above matter'.*

[14] The Tribunal had set down several matters for hearing during November and December 2017, as such , when this notice came there there was no time for the panel to have discussions with regard to to finalizing the judgment.
Due to other commitments, they were also not able to meet until in March 2018. The delay in issuing this judgment between January and now is regrettable.

The second respondent's affidavit

[15] On 28 January 2010, Director-General of the Department of Water Affairs issued a WUL in favour of the second respondent to be exercised over the property described as "Remainder of portion 2 of portions 3, 4, 5, 6, 7, 8 and 9 of the Farm Eerstelingsfontein 406 JT held under title deed number T18339/2004.

[16] The WUL had a validity period of five years from the date of issue and for specified water uses indicated as follows;

> *" 2.1 Section 21(a) of the Act: Taking water from a water resource, subject to the conditions as set out in Appendices I and II.*
>
> *2.2 Section 21(c) of the Act: Impeding or diverting the flow of water in a watercourse, subject to the conditions set out in Appendices I and III.*
>
> *2.3 Section 21(g) of the Act: Disposing of waste in a manner which may detrimentally impact on a water resource, subject to the conditions set out in Appendices I and IV.*
>
> *2.4 Section 21(i) of the Act: Altering the bed, banks course or characteristics of a watercourse, subject to the conditions set out in Appendices I and IIII.*
>
> *2.5 Section 21(j) of the Act: Removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people, subject to the conditions set out in Appendices I and V"*

[17] There was already an existing mining right over the same property in favour of 'Eyesizwe Coal (Pty) Ltd to mine coal which was executed on 12 June 2008 and valid until 11 June 2013. One of the conditions of the right was that mining should commence within one year of date of issue.

[18] On 21 August 2009 , the second respondent applied for extension of the commencement date of mining on the basis that the WUL , which it had already applied for, had not yet been granted.

> [18.1] There appears to have been no response to the request because the deponent to the second respondent's affidavit has

simply followed up the allegation by stating that " *The above-mentioned right has not been renewed despite the fact that the second respondent applied timeously*".

[19] The second respondent also appeared to have commenced some activities unlawfully , amongst which was construction of a road construction and clearance of vegetation on the property. This necessitated , an authorization in terms of Section 24G the National Environment Management Act, 107 of 1998 (NEMA). An organization known as Federation for a Sustainable Environment (FSE) objected to the granting of this authorization, which was nonetheless granted with conditions on 24 April 2013. The Mpumalanga MEC for Agriculture, Rural Development, Land and Environmental Affairs dismissed an appeal to this from FSE on 15 April 2015 .

[20] The second respondent contends that after it was granted the WUL, it commenced with its mining activities and started with construction of the haul road, but stopped after the appellants lodged the appeal. The mining activities commenced after the lifting of the suspension by the Minister of Water and Sanitation.

[21] It is further contended that the second respondent has been conducting open cast mining activities in terms of its mining right that include excavation, creating infrastructure, installing sewage septic tanks, and erecting power lines.

[22] A further contention is that second respondent complied with the conditions of the environmental authorization, which include, capturing dirty surface water, installing a subsurface drainage and rehabilitating excavated areas.

[23] On the water uses specified in the WUL, the second respondent contends that it has already commenced with all the authorised activities since the WUL suspension was lifted.

[24] It is further contended that the second respondent has already mined 81.81%of the authorised area and has already *"impeded and diverted the flow of water by building berms in order to prevent clean water from being contaminated by entering the mining area"*

[24.1] Similar allegations which I do not deem necessary to repeat for fear of burdening this judgment were made of having already performed activities relating to each and every authorised water use with a view to indicate that the second respondent has already done what it was authorised to do, but also that it has taken mitigatory steps to prevent harm to the environment.

[24.2] The second respondent estimated that all mining operations would cease during the first quarter of 2018 and that the mining reserves available were approximately '1.1 Mt in ROM'.

[25] There was no functional Tribunal at the time when the judgment of the High Court confirming the locus standi of appellants was delivered on 18 November 2013.

[25.1] The appellants applied to the Minister of Water and Sanitation on 03 June 2014 to lift the automatic suspension of the WUL in terms of Section 148(2)(b) of the NWA. The suspension was lifted on 23 September 2014. The appellants were duly notified about this, but did not take steps to challenge it.

[25.2] The second respondent received a letter dated 17 March 2016 from the Director General dated 17 March 2016 advising that the validity of the WUL was extended by 4 years and will now expire on 28 January 2020.

[25.3] Mining activities commenced on 23 September 2014 and with the various water uses authorised in the WUL.

[25.4] The expert reports submitted with the WUL application were compiled during 2004 to 2008 and that if the appeal proceeds, there will be a need to update them.

[25.5] One of the grounds of appeal identified in the affidavit is an allegations relating to lack of public participation . The second respondent disputes the allegations and contends that there was extensive public participation.

[26] On why the appeal has 'become moot', the second respondent relied on the allegations with regard to the commencement of mining activities and the use of water as indicated above. It further alleged that;

[26.1] The appellants acquiesced to the fact that it resumed mining and the upliftment of the suspension of the WUL.

[26.2] The effects of the mining that were anticipated in the WUL have already taken place.

[26.3] Preventing the second respondent at this stage to use water will have a detrimental effect on the environment and will also make it impossible to comply with the various authorizations.

[26.4] Hearing the appeal at this stage will be contrary to legal principles that courts should not deal with abstract or academic disputes that have no practical effect.

Issues raised in the appellants answering affidavit

[27] The high watermark of the appellant's submissions on why the appeal is not moot was articulated in the last paragraph of the answering affidavit where it is stated amongst other things that *'The outcome of the appeal will have a real tangible effect tangible effect on the way in which mining will continue to be conducted, it will also have an effect on the closure of the mining operations and the mitigation of pollution. The outcome in this appeal also has an impact by possibly setting a precedent of how mines should respect their obligations in terms of the Constitution, NEMA and NWA'.*

[28] The appellants dealt with the merits of the grounds of appeal to illustrate that despite what the second respondent says in the supplementary affidavit, they are still relevant and must be adjudicated upon.

[29] It is not necessary to traverse the merits of the grounds of appeal, save to identify just a few and to briefly state their basis.

[29.1] What the second respondent contends to be public participation process is in fact meetings held between the parties after the application of the WUL. They were not provided with the documents submitted in support thereof. The appellants contend that they only had sight of the documents, identified as 'Social and labour plan ' after the IWUL was granted.

[29.2] The Responsible Authority is alleged to have failed to exercise the discretion in terms of section 41(2)(a)-(c) of the NWA that entitles him/her to direct the appellant for a WUL to provide further information or undertake certain assessments.

[29.3] The appellants allege that the "*water quality parameters was not included in the application*" and that this is contrary to the provisions of section 27 of the NWA that obliges the responsible to take into account the quality of the water in the water resource which may be required from the reserve when considering whether the water use will be efficient and beneficial and in the public interest.

[29.4] The IWUL does not specify the procedures for closure of the mine and rehabilitation steps to mitigate environmental damage.

[30] The appellants disputed the allegations that they did nothing after the Minister had uplifted the suspension of the IWUL.

[31] They attached correspondence addressed to the Minister that clearly show that they objected to the lifting of the suspension and that they only learnt much later that it was actually granted. They wrote to the Minister on three occasions, the last being on 11 November 204 to ask for reasons , which were never provided. They threatened legal action to obtain the reasons.

The appellants allege that they leant from informal sources in March 2015 that the Tribunal was reconstituted. They wrote to the department and sought confirmation and this was never confirmed

until they launched an application at the High Court for reconstitution of the Tribunal and the matter was due to be heard on 22 June 2015.

[32] The Chief Director of Legal Services only confirmed the reconstitution of the Tribunal on 11 June 2015 and with regard to the court application, he suggested that that there was no need for the appellants to pursue the court hearing.

[33] There is no record or explanation with regard to what happened between June 2015 and at least February 2017 when the appellants' attorneys escalated the matter to the Chairperson, Advocate Makhubele in a letter dated 28 March 2017 that necessitated the Case Management meeting and the subsequent directives.

[34] I am satisfied that the appellants have done everything within their powers to prosecute the appeal.

[35] The appellants further contend that the second respondent does not have a valid mining right in view of the fact that it expired during 2013 and has not been renewed. This, according to the appellants, means that the second respondent has been carrying on mining activities unlawfully for a period of four years. They further contended that the IWUL was extended without a valid mining right.

They also highlighted the fact that the second respondents commenced unlawful mining in 2009 as it did not have a IWUL yet, and only ceased after their intervention.

[36] Having alluded to the background of their encounters with the second respondent and the various interventions that they had to make as highlighted above, the appellants contend that the second

respondent has continuously acted *'in total disregard for its legislative obligations'* . This , in their view, *'renders the terms of the IWUL even more relevant ..'*

Oral submissions

[37] Counsel for the both parties handed in written submissions (heads of argument) that in the main are the facts ventilated in the affidavits.

[38] They also referred to authorities on the question of mootness of cases.. I will not refer to all the cases in their respective heads of argument because the principles with regard to mootness of a case are well settled. What I need to address is the factual submissions with regard to whether the appeal before the Tribunal has become moot/academic.

[39] The second respondent's counsel urged us to treat the affidavits filed like papers in a motion court . He argued , both in his heads of argument as well as in his oral submissions that the appellants have failed to dispute the material deposed in its supplementary affidavit and as such there is no opposing version to what it has put forward with regard to compliance with the various authorizations. He referred to the case of Da Mata v Otto N.O 1972 (3) SA 858 at 882 G-H

[39.1] This case may be good authority in motion proceedings, but not in the circumstances under which the supplementary affidavit in this matter was filed.

[39.2] In the matter before us, the onus rests on the second respondent to convince this panel that indeed the mining

operations have advanced to such a state that hearing the appeal on the merits has become moot.

[40] Even if one were to apply the motion court standard, the proceedings before us would be considered an interlocutory application. The party that seeks relief must satisfy the court that he has made a case.

[41] The supplementary affidavit of the second respondent should have addressed the issues indicated in the following paragraphs of the Directives that read as follows;

> *[5.1] The second respondents in the appeals under case numbers WT03/06/2010 and WT24/2009 (Exxaro and Xstrata) are directed to file their Supplementary Affidavits in the appeal on or before* ***30 June 2017****, and substantiate, in detail, and with reference to relevant evidence that includes, but not limited to ; documents, diagrams and opinions with regard to their submission that hearing of the appeal at this stage will not only be academic but it would also have no practical effect or result";*

[42] The panel expressed its dissatisfaction with the evidence presented by the second respondent in the supplementary affidavit. There was a suggestion that the panel may conduct an inspection in loco with a view to satisfy itself with regard to the status of the operations.

> [42.1] This is not necessary because on the second respondent's own version the operations were only due to cease in months to come.

[42.2] The submissions and the whole hearing ended up being an examination of how each and every issue in the licence has been complied with.

[43] It would not have been a problem if the second respondent had stated that it has ceased mining operations. The truth of the matter, on its own version, is that at the time of the hearing, there was still about 10% mining operations over a few hectares still to be completed. This was estimated to be concluded in the first quarter of 2018 , some 10 months ahead.

[44] The question as to whether the matter is moot or not is firstly, a factual assessment, then application of the legal principles.

It is trite that even if the matter may be factually moot, the merits may still be considered if it is in the interests of justice to hear it, and if the outcome may have some practical effect on the parties or on others (***Independent Electoral Commission v Langeberg Municipality [2001] ZACC 23***]

[45] The enquiry in each case starts with considering the facts, and if factually the issues have become academic, there must exists some exceptional circumstances that entitles the court to exercise its discretion to hear the matter on the basis of it having a potential impact on others. [See for example; ***Legal Aid South Africa v Magidiwana and Others [2015] ZACC 28*** where the court held that there were no exceptional circumstances].

[46] The fact that the mining operations had not completely ceased means that factually, between the parties there are still live issues.

It is only if 100% the operations were completed that the enquiry with regard to mootness would begin.

[47] Even if the operations had been concluded, the issues raised as grounds of appeal rest on the constitutional guarantees to a safe and healthy environment.

[48] Consequently, even if the decision was that factually the operations have ceased, I believe that the appellants would still be entitled to have the merits of the appeal adjudicated.

[49] In view of the finding on the factual situation it is not necessary to examine the other submissions made by the parties with regard to compliance with the WUL and whether the amendments to the NWA with regard to rehabilitations processes affect this hearing. In any event, the amendments to the NWA do not have retrospective effect.

[50] Each and every ground of appeal is still relevant.

[51] Another consideration is the fact that the delays in finalizing the appeal were not caused by the appellants. The lifting of suspension of WUL has unintended consequences such as what has been demonstrated in this matter.

[52] The WUL holders continue to use water whilst appellants wait for their turn to be heard by the Water Tribunal, which is often years depending on many factors.

In some case, the WUL holders raise every imaginable technicality, which they are entitled to, which end up with appeals pending for long periods.

This in my view is an injustice to the appellants and it must be addressed at an appropriate time.

It is denial of justice and access to fair ventilation of disputes if, after enduring postponements and other delays not caused by them, the appellants are told that the appeal is moot whereas the WUL holder has achieved maximum benefits simply because the suspension was lifted in the course of those delays. It is the same as allowing a boxer to continue to throw punches on his opponent whose hands are still being treated for an injury.

Conclusion

[53] In the circumstances, the application that the appeal be declared moot or academic is refused.

TAN MAKHUBELE SC

Chairperson, Water Tribunal and Chairperson of the Panel

I agree, and it is so ordered;

FERDINAD ZONDAGH

Member of the Water Tribunal

APPEARANCES:

Second respondent:	**Advocate J Saunders**
Instructed by:	Eben Griffiths Attorneys
	Wierda Park, CENTURION
Appellants:	**Advocate Carien van der Linde**
Instructed by:	Legal Resources Centre

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