

IN THE WATER TRIBUNAL**HELD AT PRETORIA****CASE NO: 25/11/2009**

In the appeal between:-

**ESCARPMENT ENVIRONMENT
PROTECTION GROUP****1ST APPLICANT****LANGKLOOF ENVIRONMENTAL
COMMITTEE****2ND APPLICANT**

and

**THE DEPARTMENT OF WATER AND
ENVIRONMENTAL AFFAIRS****1ST RESPONDENT****WERM MINING (PTY) LTD****2ND RESPONDENT**

CONDONATION RULING: 04/06/2010

APPEARANCES

Coram : L.J Lekale (Mr) - Chairman

For the Applicants : Adv. Susanna Cowen instructed by the
Legal Resources Centre - Johannesburg

For the First Respondent : Mr. T.M Sedibe from its Legal Services
Directorate – Pretoria

For the Second Respondent : Adv. Peter Lazarus instructed by
Werkmans – Attorneys

DETAILS OF HEARING AND REPRESENTATION:

- [1] The application for condonation of the apparent late lodging of an appeal was heard in earnest on the 26th May 2010 in Pretoria.
- [2] The 2 (two) applicants were represented by **Adv. S Cowen** instructed by the **Legal Resources Centre – Johannesburg** while the First Respondent, on its part, was represented by **Mr. T.M Sedibe** from its Legal Services Directorate in Pretoria.
- [3] The Second Respondent was represented by **Adv. P Lazarus** instructed by **Messrs. Werkmans – Attorneys of Sandton**.
- [4] The proceedings were recorded mechanically on 2 (two) audio tapes.

ISSUE TO BE DECIDED:

- [5] The preliminary question raised by the applicants is whether or not the appeal was lodged outside the 30 (thirty) day period prescribed by section 148 (3) of the National Water Act (the NWA) for lodging an appeal.
- [6] In the event of the foregoing question being decided in the affirmative, the next enquiry is whether or not good cause exists for condonation of the delay involved in lodging the appeal.

BACKGROUND TO THE ISSUE:

- [7] On the 18th April 2006 the Second Respondent applied for a water use licence with the First Respondent which licence was, eventually, issued on or about the 24th October 2008.

- [8] At all times material to the making of the application and the granting of the licence the applicants were in contact with both respondents and voiced out their objections to the granting of the relevant licence.
- [9] In December 2008 the applicants were informed by the Second Respondent that the licence had been issued.
- [10] On the 20th February 2009 the applicants secured a copy of the relevant licence through a third party, whereafter, they requested reasons for the issuing of the licence from the First Respondent on the 29th April 2009.
- [11] Save for a letter informing the applicants that the matter had been referred to the responsible authority, the applicants received no response to their request for reasons.
- [12] On the 10th October 2009 the Second Applicant's representation at a Water Indaba in Mpumalanga received the First Respondent's document which recorded that the Second Respondent had been granted the relevant licence.
- [13] The applicants, thereafter, lodged an appeal against the licence in question on the 13th November 2009. They were, however, advised by the Registrar of the Water Tribunal to apply for condonation and they obliged on the 3rd December 2009.
- [14] The matter was, eventually, scheduled for a hearing on the 23rd April 2010 but could not be finalised with the Second Respondent's representative requesting an opportunity to deliver Heads of Argument after going through the Summary of Appellants' Argument submitted for and on behalf of the applicants.

- [15] The hearing reconvened on the 26th May 2010 with the parties being in agreement that only the application for condonation fell to be dealt with.

SURVEY OF EVIDENCE AND ARGUMENT:

- [16] No oral evidence was heard and the parties submitted written arguments and made oral submissions.

- [17] On behalf of the applicants **Adv. Cowen** submitted to, inter alia, the following effect:

[17.1] the 30 (thirty) day period prescribed by NWA for lodging an appeal never started running because none of the 3 (three) events that trigger the running of the same occurred insofar as the notice of the decision granting the licence to the Second Respondent was never sent to the applicants nor was it published in the Government Gazette and no reasons were given by the First Respondent for the relevant decision;

[17.2] it is, thus, not necessary for the applicants to apply for condonation;

[17.3] in the event of it being found that it is necessary to apply for condonation, then and only in that eventuality, good cause exists for condonation because:

- (a) the request for reasons was made within the 90 day period limited by the Promotion of Administrative Justice Act (PAJA) for making the same;

- (b) no reasons were ever furnished until the applicants decided, after the 10th October 2009, to consult lawyers and to lodge an appeal;
- (c) it was necessary for the applicants to secure legal advice and assistance;
- (d) the applicants have good prospects of success in their appeal because neither the First Respondent nor the Second Respondent allowed them to participate in the process despite being fully aware of the direct and / or indirect interest they have in the matter of the licence, among others;
- (e) the appeal is not academic and the applicants are prejudiced as a result of serious pollution coming from the mines in the form of, inter alia, mine acid drainage.

[18] **Mr. Sedibe** for the First Respondent submitted to the following effect, among others:

[18.1] the applicants were not formal objectors and were not notified of the decision to grant the relevant licence as a matter of oversight on the part of the First Respondent;

[18.2] the First Respondent does not oppose the application and will abide by the decision of the Tribunal on the matter.

[19] **Adv. Lazarus**, for the Second Respondent, submitted to, inter alia, the following effect:

- [19.1] the Second Respondent was always aware that the applicants were objectors and **de facto** engaged with them from 2005;
- [19.2] the applicants became aware in December 2008 that the licence had been granted but waited too long to request reasons for the same;
- [19.3] the determinative date should be the date on which the applicants received a copy of the licence viz/ 20th February 2009 and not the 10th October 2009;
- [19.4] the cause of the applicants' grief is actually the alleged non-compliance by the Second Respondent with the conditions of the relevant licence and their remedy lies in the enforcement provisions of NWA and not the appeal;
- [19.5] the appeal is opportunistic and enjoys no prospects of success because the First Respondent exercised its discretion against inviting written representations;
- [19.6] the appeal is academic and the applicants suffer no Prejudice as a result of the relevant licence;
- [19.7] the appeal is, thus, late and requires condonation;
- [19.8] the position advocated for the applicants is untenable because appellants cannot be allowed to have unlimited time periods within which to lodge appeals;
- [19.9] no good cause exists for condonation.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [20] The parties are **ad idem** about the events that generally trigger the running of the prescribed 30 day period. They are, however, at variance with regard to whether or not, in the present matter, the said period did in fact start to run.
- [21] Adv. Lazarus, for the applicants, contends that the said period started to run from the 20th February 2009 when the applicants received a copy of the licence from a third party. In this regard he argues that substance should prevail over the form which the sending of the licence to the applicants took. His view is that the applicants did, in fact, receive a copy of the licence although it was not sent to them by any of the respondents. What matters is, according to him, the fact that they did receive the relevant copy of the licence.
- [22] On behalf of the applicants Adv. Cowen effectively submits that what is contemplated by section 148 (3) of NWA and Rule 4 (1) of the rules of the Water Tribunal is that the relevant decision should be sent by the responsible authority to the objector.
- [23] The parties are, effectively, in agreement that:
- [23.1] no notice of the relevant decision was ever sent to the Applicants by the First Respondent as the responsible authority;
- [23.2] section 148(1)(f) of NWA grants the right to appeal against a decision on a licence application made under section 41 to, inter alia, **“any other person who has timeously lodged a written objection against the application”**;

- [23.3] the First Respondent was aware, at all times material to the relevant decision granting the licence, that the applicants had an interest in the matter and were objecting to the granting of the relevant licence;
- [23.4] no notice contemplated by section 41(4) of NWA was ever issued by the Second Respondent, as the applicant for the relevant licence, stating, inter alia, that written objections may be lodged against the licence application before a specified date;
- [23.5] the First Respondent, as the responsible authority, did not, at any stage prior to the issuing of the relevant licence, require the Second Respondent, as the applicant for the relevant licence, to give the notice contemplated by section 41(4) of NWA;
- [23.6] a copy of the relevant licence was received by the applicants, through a third party, on the 20th February 2009 after they had learnt about its existence in December 2008.
- [24] In my view section 148(3) of NWA and the whole appeal scheme of NWA envisage the following:
- [24.1] that appeals may only be lodged by the persons mentioned in section 148(1) of NWA;
- [24.2] that 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 and any person who lodged a written objection against such an application timeously;

[24.3] that 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**)

[24.4] that such a notice inviting objections can only be given by the applicant if required by the responsible authority to do so;

[24.5] that once there is a timeous written objection to a section 41 licence application, the responsible authority is obliged to **“notify the applicant and any person who has objected to the application”** promptly after it has reached a decision on a licence application.

(see **section 42(a) of NWA**)

[24.6] that section 148(3)(b) of NWA, on its part, limits the lodging of an appeal to 30 days after the notice of the decision has been sent to the appellant as required by, inter alia, section 42(a) of NWA;

[24.7] that, in an ideal situation, the notice of a decision on a section 41 application would, as a matter of law, have been sent by the First Respondent, as the responsible authority, to the Second Respondent, as the applicant, and the applicants, as objectors, where they have lodged written objections against the application timeously.

[25] In **casu** no written objections were invited and subsequently made as contemplated by section 41(4) of NWA.

- [26] It follows, **stricto sensu**, that where a written objection is lodged timeously in terms of section 41(4) of NWA, the 30 day period prescribed by section 148(3) of the NWA does not start to run until and unless a notice of the relevant decision on the section 41 application has been sent, by the responsible authority, to the objector as required by section 42(a) of NWA.
- [27] An objector who feels aggrieved by the relevant decision but has not been sent a notice of the same would, most probably, be entitled to approach either the High Court for an order directing the responsible authority to comply with the provisions of section 42(a) of NWA or the Water Tribunal by way of an appeal within a reasonable time once and after he has become aware and acquired sufficient details of the relevant decision. In my view the foregoing prevails because there exists a decision on the relevant application and the appeal lies against that decision according to section 148(1)(f) of NWA.
- [28] In this matter no objections were invited, made and received in terms of section 41(4) of NWA. The First Respondent was, thus, not obliged in terms of section 42(a) of NWA to send the notice of the relevant decision to the applicants as objectors.
- [29] The said notice was, in fact, only sent to the Second Respondent as the applicant for the licence in terms of section 42(a) of NWA.
- [30] The provisions of section 148(3) of NWA are, therefore, not applicable to the applicants in the same way as they would not be applicable to any objector who has lodged an objection timeously in terms of section 41(4) of NWA where no notice of the relevant decision has been sent to him. The question as to whether or not the applicants have **locus standi** to lodge an appeal in terms of section 148(1)(f) of NWA does not arise for determination at this stage of the enquiry and would be touched upon, if necessary, later in this decision as part of an enquiry into prospects of success in the appeal.

- [31] The real question to be determined is whether or not the appeal was lodged within a reasonable time, as required by the common law, after the applicants became aware and had acquired sufficient details of the relevant decision.
- [32] The information properly before the Tribunal is to the effect that after the applicants received a copy of the licence they, effectively, requested reasons for the relevant decision within the 90 day period limited by PAJA. No reasons were, however, received by them until the existence of the relevant licence was confirmed by a document which was circulated at a Water Indaba on the 10th October 2009.
- [33] The appeal was, eventually, lodged in November 2009 after a legal advice was sought and secured and, further, without any reasons having been furnished.
- [34] The Tribunal is persuaded that the appeal was lodged within a reasonable time regard being had to, inter alia, the fact that:-
- [34.1] using the prescribed 30 day period as a benchmark, the 13th November 2009 fell some 4 days outside the 30 day period calculated from the 10th October 2009;
- [34.2] the information received by the applicants on the 10th October 2009 was, most probably, sufficient to enable them to lodge the appeal as no reasons had been furnished in response to their request;
- [34.3] the reasons advanced for not lodging the appeal any time after the 10th October 2009 and before the 13th November 2009 are plausible, adequate and acceptable.

[35] Even if the Tribunal is wrong in the foregoing finding, I am satisfied that good cause exists for condonation on the basis of adequate and acceptable reason advanced for the minimal delay involved as well as the fact that there exists a bona fide case for the applicants which, although open to some doubt, prima facie carries some prospects of success alternatively, given the strong explanation for the delay, I consider that prospects of success passed muster for the purposes of condonation.

(see generally **Chetty v Law Society (Tvl) 1985 (2) SA 756 (A)** and **Melane v Santam Insurance Co. Ltd 1962(4) SA 531 (A)**).

RULING:

[36] For the above reasons condonation is granted and the appeal shall be rescheduled for hearing in due course.

DATED AT PRETORIA ON THIS 9th DAY OF JUNE 2010.


L J LEKALE
Chairperson