

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 24/11/2009

In the matter between:-

ESCARPMENT ENVIRONMENT PROTECTION
GROUP

1ST APPELLANT

WONDERFONTEIN COMMUNITY ASSOCIATION

2ND APPELLANT

and

DEPARTMENT OF WATER AFFAIRS

1ST RESPONDENT

XSTRATA SOUTH AFRICA (Pty) Ltd

2ND RESPONDENT

APPEAL RULING : 2011-07-22

APPEARANCES:

Coram : LJ Lekale (Mr) – Chairperson
Mr H Thompson – Member
Mr A.S Makhanya – Member
Mr A.S Hadebe – Member

For Appellants : **Adv. G Wilks** 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. A Dodson** with **Adv. H Barnes**
instructed by Webber Wentzel
Attorneys of Johannesburg

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 12th July 2011.
- [2] The appellants were represented by **Adv. G Wilks** 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, on the other hand, was represented by **Adv. Alan Dodson** appearing with **Adv. Heidi Barnes** and instructed by **Webber Wentzel - Attorneys** of Johannesburg

ISSUE TO BE DECIDED:

- [4] The preliminary question raised by the Second Respondent is whether or not the appellants have **locus standi** to lodge an appeal with the Tribunal regard being had to the fact that no notice was published in the media calling for written objections against the application for a water use licence as contemplated by section 41(4) of the National Water Act (NWA).
- [5] In the event of the foregoing question being decided in the negative, the Tribunal is requested by the Second Respondent to non-suit the appellants and to dismiss the appeal accordingly.

BACKGROUND TO THE ISSUE:

- [6] On the 9th December 2009 the First Respondent issued a water use licence in favour of the Second Respondent after the appellants, through the First Appellant, had submitted a written objection against the application on the 4th December 2007.

- [7] The appellants felt aggrieved by the First Respondent's decision on the Second Respondent's water use licence application and effectively lodged an appeal with the Tribunal on the 28th April 2010.
- [8] On the 30th March 2011 the Second Respondent gave notice of its intention to raise the issue of lack of **locus standi** on the part of the appellants **ante omnia**.
- [9] The parties, thereafter, agreed to deliver written submissions dealing with the said preliminary point not later than the 6th June 2011.
- [10] The parties further effectively agreed to make verbal submissions at the hearing of the matter on the 12th July 2011.

SURVEY OF EVIDENCE AND ARGUMENT:

- [11] The parties submitted heads of argument and, further, made oral submissions to, **inter alia**, the following effect:

[11.1] **For the Appellants:**

Mr Wilks submits to the effect that:

- (a) it is common cause that the First Respondent did not call for written comments in terms of section 41(2)(c) of NWA nor did it call upon the Second Respondent to act in terms of section 41(4) of NWA;
- (b) a literal reading of section 41(2)(c) of the NWA **prima facie** leads to the conclusion that the appellants do not have the requisite **locus standi**;

- (c) the literal restrictive interpretation is not in conformity with the Constitution which requires judicial officers to read legislation, where possible, in ways which give effect to fundamental values;
- (d) the said interpretation does not accord with the objects and purport of the Constitution insofar as it excludes public participation of interested and affected parties;
- (e) NWA should further be read in the light of the National Environmental Management Act 107 of 1998 (NEMA) which gives effect to section 24 of the Constitution;
- (f) the fact that the appellants lodged an objection with the First Respondent before the relevant licence was issued takes away the discretion which the First Respondent may be found to have of calling for public participation and obliges it to partake in such a process.

[11.2]

For the First Respondent:

Mr Sedibe submits to the following effect, among others:

- (a) the Water Tribunal is a creature of statute and is, as such, obliged to comply fully with any requirements prescribed by its enabling statute;
- (b) the appellants unilaterally lodged an objection without being prompted thereto as contemplated by section 41(4)(a)(ii) of NWA;
- (c) the appellants, therefore, lack **locus standi**;
- (d) the Constitution and NEMA are irrelevant to the issue.

Mr Dodson submits at length to, *inter alia*, the following effect:

- (a) neither section 24, nor section 33 of the Constitution, nor NEMA, nor the Promotion of Administrative Justice Act No.3 of 2000 (PAJA) require or compel that a person affected by an administrative action be afforded an internal or administrative appeal;—
- (b) an internal or administrative appeal is not a necessary component of a public participation process;
- (c) there is no justification for a proposition that an interpretation with reference to the Bill of Rights necessitates that a party be afforded an administrative appeal;
- (d) the appellants did not timeously submit an objection as part of a section 41(4) process;
- (e) the interpretation contended for by the appellants is unduly strained and the Tribunal should follow its earlier decisions on the same point **in limine**;
- (f) the Tribunal should go further and dismiss the appeal on the ground of lack of standing.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[12] The question in this matter is whether or not the written objection lodged by the appellants is of the kind contemplated by section 148(1)(f) of NWA for the purposes of clothing the appellants with the necessary standing to lodge an appeal with the Tribunal.

- [13] Mr Wilks for the appellants contends that a constitutional interpretation of the relevant statutory provisions answers the question in the affirmative while a literal construction provides a negative answer.
- [14] Mr Sedibe for the First Respondent effectively submits that a constitutional interpretation is not applicable and advocates a literal construction which answers the question in the negative.
- [15] Mr Dodson, on behalf of the Second Respondent, effectively submits that both the literal and the constitutional interpretations answer the question in the negative insofar as he contends, *inter alia*, that there exists no reason why an interpretation with reference to the Bill of Rights necessitates that a party in the position of the appellants be afforded an administrative appeal.
- [16] In the appellants' contentions for constitutional interpretation Mr. Wilks relies on sections 24 and 33 of the Constitution as well as NEMA as giving effect to section 24 of the Constitution.
- [17] Section 24 and 33 of the Constitution entrench the fundamental rights to environmental protection and just administrative action respectively. NEMA gives meaning to section 24 while PAJA gives effect to section 33.
- [18] A construction which conforms to sections 24 and 33 of the Constitution would, in the Tribunal's view, ensure environmental protection and just administrative action for the appellants. This, however, does not necessarily entail the right to follow internal or administrative appeal procedures such as lodging appeals with the Tribunal.
- [19] PAJA heeds the constitutional call for, *inter alia*, making provision for review by courts of law and an independent and impartial tribunal established for the purpose of reviewing administrative action.
- [20] The Water Tribunal is not a tribunal contemplated by section 33 of the Constitution and PAJA.

[21] As correctly submitted by Mr Dodson neither the relevant provisions of the Constitution nor the pieces of legislation relied upon by the appellants entitle the appellants to internal administrative appeal procedures as of right.

[22] In the Tribunal's opinion an interpretation which does not ensure that the appellants get a standing to lodge appeals with the Tribunal neither offends the Constitution nor fails to conform to the same in the circumstances of the present matter.

[23] In conclusion and in line with decisions of the Tribunal in, *inter alia*, **Carolyn Nicola Shear v The Regional Head: Gauteng Region – Department of Water Affairs and Eye of Africa Development (Pty) Ltd Case No. WT 19/02/2009** the objection lodged by the appellants is not an objection contemplated by section 148(1) (f) of NWA insofar as it was not lodged in the context of a section 41(4) notice procedure.

DECISION:

[24] In the result the appellants lack the necessary standing to lodge an appeal with the Tribunal.

[25] The appeal is, therefore, dismissed.



L J LEKALE
(CHAIRPERSON)