

**IN THE WATER TRIBUNAL
HELD AT THE BURGERS PARK HOTEL IN PRETORIA**

REF: WT 08/03/2011

In the matter between:

**THE FEDERATION FOR SUSTAINABLE
ENVIRONMENT**

APPELLANT

and

THE DEPARTMENT OF WATER AFFAIRS

1ST RESPONDENT

CHEMWES (PTY) LTD

2ND RESPONDENT

MINE WASTE SOLUTION (PTY) LTD

3RD RESPONDENT

FIRST URANIUM (PTY) LTD

4TH RESPONDENT

APPEAL RULING: 20 DECEMBER 2011

1. APPEARANCES, REPRESENTATION AND DETAILS OF HEARING

Coram : Dr. W Singo (Deputy Chairperson of the Water Tribunal
and Presiding Officer of the hearing)

Mr. H Thompson (Member of the Water Tribunal)

For the Applicant : Adv. de Vos, instructed by the Legal Resource Centre

For the 1st Respondent: Adv. Mojapelo, instructed by the State Attorney

For the 2nd to 4th Respondents: Adv. Lazarus, instructed by Warburton Attorneys

1.1. This is a unanimous ruling in this matter heard on 1 December 2011 at the Burgers Park Hotel in Pretoria.

2. ISSUES TO BE DECIDED

- 2.1. The preliminary question anticipated by the Appellant on the basis of previous cases heard by the Water Tribunal in *pari materia* is whether or not the Appellant has any *locus standi* to lodge the present appeal regarding the fact that the 1st Respondent did not require from the 2nd Respondent to give suitable notice in newspapers and other media within the contemplation of section 41(4) of the National Water Act of 1998 (Act 36 of 1998) (NWA) and, in fact, the 2nd Respondent did not give such notice?
- 2.2. The question could also be phrased from another perspective, namely, does the Water Tribunal have jurisdiction to hear the appeal lodged by a person other than the applicant of the licence, if the 1st Respondent did not require from the 2nd Respondent to give suitable notice in newspapers and other media within the contemplation of section 41(4) of the NWA?
- 2.3. In the case where the above question is answered in the positive, whether the appeal of the Appellant was lodged late, and if lodged late, whether there is a good reason to condone the late lodging of the appeal by the Appellant.

3. BACKGROUND TO THE ISSUE

- 3.1. The 2nd Respondent (Chemwes (Pty) Ltd) launched an integrated water use licence application during January 2010 with the 1st Respondent (the Department of Water Affairs).
- 3.2. On 11 June 2010 the 1st Respondent issued the 2nd Respondent with a licence, for impeding or diverting the flow of water in a water course, disposing waste in a matter which may detrimentally impact on a water resource and altering the bed, banks, course and characteristics of a watercourse.
- 3.3. The 1st Respondent did not require from the 2nd Respondent to give suitable notice within the contemplation of section 41(4) of the NWA.
- 3.4. On 8 March 2011 the Appellant lodged an appeal against the issuing of this licence with the Water Tribunal in terms of section 148(1)(f) of the NWA.

4. SURVEY OF EVIDENCE AND ARGUMENTS

Evidence and documents submitted

- 4.1. No oral evidence was adduced. The Appellant and Respondents made oral submissions through their respective representatives.

- 4.2. The Bundle from the Registrar of the Water Tribunal also forms part of the evidence and arguments analysed by the Tribunal.

Contents of the documents submitted by the Appellant and also argued

- 4.3. The Appellant is aware of the other decisions of the Water Tribunal on matters with similar facts and does not disregard them, and assume that they apply to this matter due to the precedent law.
- 4.4. However, the Appellant feels that there are some points that have not been argued previously before the Tribunal on the matter and that may result in a favourable decision for the Appellant. These points are:
- 4.4.1. Although the provisions of section 148(1)(f) of the NWA limit the number of persons to approach the Tribunal, in this case only to a person who has timeously lodged a written objection against the licence application, the Tribunal has incidental and ancillary powers to perform its functions, and, by allowing other persons to appear before the Tribunal, better decisions could eventually be reached. There is nothing in section 148 which provides that interested persons must have lodged a written objection in terms of section 41 of the NWA and that the provisions of section 148 must be read subject to section 41;
- 4.4.2. There is an anomaly in the NWA which may be against the equality provisions as contemplated in section 9 of the Constitution of the Republic of South Africa, 1996. Section 148(1)(f) allows a person who has timeously lodged a written objections against the applicant for a licence, which is incorporated into section 41(4)(a)(ii), while section 42(2)(c) states that the Responsible Authority may invite written objections from any person who has an interest in the matter.
- 4.4.3. The correct interpretation of section 148 of the NWA is one which promotes the spirit, purport and objects of the Bill of Rights, in terms of section 39(2) of the Constitution. The Tribunal is under the Constitutional duty to give effect to the rights, particularly those in sections 24, 27, 33 and 34 of the Constitution, when interpreting section 148.

Arguments by the 1st Respondent

- 4.5. There is no defect in the law on the matter. The decisions by the Tribunal in the other cases on the matter are correct and should be followed. The Appellant has no *locus standi* in the matter.

Arguments by the 2nd to 4th Respondents

- 4.6. There were written objections in the other cases before the Tribunal but because they were not lodged due to the provisions of section 42(4)(a)(ii) of the NWA, those Appellants did not have *locus standi* in those cases.
- 4.7. In this specific case, no written objection was lodged at any stage of the licence application. Therefore the Appellant has no *locus standi* in the matter.
- 4.8. The Appellant did not raise any new arguments that the Tribunal did not deal with previously.
- 4.8.1. As far as the incidental and ancillary powers argument is concerned, this was dealt with by the Tribunal in for example the Carolyn Nicola Sher decision (WT19/02/2009) dated 30 November 2010.
- 4.8.2. The Tribunal is a creation of statute and could therefore only exercise powers as stipulated in the NWA and within the four corners of the Act. See for example the Tribunal decision in WERM (WT25/11/2009) dated 20 July 2011.
- 4.9. There is no anomaly between the provisions of section 41(2)(c) and 41(4) of the NWA. Comments and objections are not the same. It is two different processes that should be followed under these provisions.
- 4.10. The use of water is most of the time ancillary to another process or use. Usually there is an extensive public participation process under the National Environmental Management Act of 1998 (Act 107 of 1998) for the other process and use and therefore the public participation process should not be duplicated under the NWA

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1. The Appellant argues that the Tribunal has jurisdiction to hear the matter as the Tribunal has incidental and ancillary powers to perform its functions and by allowing that it would promote the spirit, purport and objects of the Bill of Rights, in terms of section 39(2) of the Constitution. The Tribunal is under the Constitutional duty to give effect to the rights, particularly those in sections 24, 27, 33 and 34 of the Constitution when interpreting section 148.
- 5.2. The Tribunal is of the viewpoint that the provisions of section 33 and not that of section 34 of the Constitution apply to the operation of the Tribunal, as the decisions of the Tribunal are “administrative” and not “judicial” of nature. The Tribunal makes administrative decisions within the framework of the law (by deciding on appeals on the wisdom of the conduct of the responsible authority on the merits of the case) and not applying the law to a dispute. Therefore, the

precedent law is not applicable to the Tribunal as in the case of a court of law. (See chapter 23 of *The Bill of Rights Handbook* 5th ed by De Waal J, Currie I and Erasmus G, Juta & Co Ltd 2001.)

- 5.3. The Water Tribunal is of the viewpoint that the Tribunal is a creation of the Legislature and has therefore only the powers, functions and duties assigned to it by the Legislature, and in this case the NWA. The relevant provisions of the NWA should be studied to determine the powers, functions and duties of the Water Tribunal.
- 5.4. The Tribunal may have incidental and ancillary powers but they should still be derived from the relevant provisions of the NWA. For example, if the Water Tribunal has the jurisdiction to hear appeals on a matter, but no provisions on the procedure to be followed are set out in the NWA, the Tribunal may due to its incidental and ancillary powers make rulings on that.
- 5.5. The Water Tribunal is of the opinion that for the Appellant to have *locus standi*, the Tribunal must have the jurisdiction to hear an appeal. Once it is clear what the jurisdiction of the Tribunal is, then and only then, could it be determine whether the Appellant has the necessary *locus standi*.
- 5.6. In the previous cases before the Water Tribunal on similar matters, the Tribunal addressed each of the matters from a *locus standi* angle. In this case the Tribunal will address it from a jurisdiction angle. The result is the same, as the one is the mirror view of the other. However, there might be differences between the cases. In the previous cases there were arguments that objections were lodged, while in this cases it rather appears that written comments were submitted. Whether it is objections lodged or comments submitted, the final conclusion is according to the Tribunal the same. However, it is important to note that comments and objections are not the same. Each of them plays a different role during the process to evaluate and decide on a licence application.
- 5.7. If the Responsible authority has not required from the applicant for the licence to give suitable notice within the contemplation of section 41(4) of the NWA, the Tribunal is still of the viewpoint that it would have no jurisdiction to hear any appeal under section 148(1)(f) of the NWA lodged by a person other than by the applicant of the licence concerned. This viewpoint is reflected in the previous decisions of the Tribunal on the matter. The arguments and conclusions of those decisions should be incorporated into this decision with the necessary changes in detail.
- 5.8. The arguments between lodging objections within the contemplation of section 41(4) or submitting comments due to the provisions of section 41(2)(c) is therefore not necessary to determine whether the Tribunal has the necessary jurisdiction to hear the matter.

- 5.9. Only once the Tribunal has jurisdiction and deal with the matter, is the Tribunal under the Constitutional duty to give effect to the Bill of Rights, particularly those contained in sections 24, 27 and 33 of the Constitution.
- 5.10. The Tribunal is of the viewpoint that the Appellant is therefore not a person contemplated in section 148(1)(f) of the NWA for the purpose of lodging an appeal to the Water Tribunal and as such not suited to bring the present appeal.
- 5.11. In the light of this finding it is not necessary to determine whether the appeal of the Appellant was lodged late, and if lodged late, whether there is a good reason to condone the late lodging of the appeal by the Appellant.

6. RULING

- 6.1. After the Tribunal has considered all the relevant information, the Water Tribunal is of the opinion that it has no jurisdiction to hear an appeal by a person other than the applicant for the licence to use water, if the Responsible Authority did not require from that applicant to give suitable notice in newspapers and other media within the contemplation of section 41(4) of the NWA.
- 6.2. The Tribunal is therefore satisfied that the Tribunal has no jurisdiction to hear the matter. The Appellant has therefore no *locus standi* in this matter to present the appeal.
- 6.3. The file on this matter before this Tribunal should therefore be closed.

Dated at Pretoria on this ²⁰..... day of December 2011.


H. Thompson