

**IN THE WATER TRIBUNAL**

**HELD AT PRETORIA**

**CASE NO: WT 09/02/2009**

In the matter between:-

**GANNAPUT PLASE (PTY) LTD & ANO.  
PARTY**

**APPLICANT**

and

**THE DEPARTMENT OF WATER AFFAIRS AND  
FORESTRY**

**RESPONDENT**

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**CONDONATION RULING : DATE 23-06-09**

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**APPEARANCES:**

Coram : Mr. L.J Lekale – (chairperson)  
Mr. H. Thompson – (member)  
Mr. A.S Makhanya – (member)

For the Applicants : Mr. A.R Kritzinger instructed by Lange Carr & Wessels  
Inc. of Upington.

For the Respondents : Mr. T.M Sedibe from the respondent's Legal Services  
Directorate.

**1. DETAILS OF HEARING AND REPRESENTATION:**

- 1.1. An application for condonation of late lodgement of an appeal was heard in Pretoria on the 26<sup>th</sup> May 2009;
- 1.2. The two(2) applicants were represented by **Mr. A.R Kritzinger**, their Pretoria correspondent attorney attached to the firm **Husain, Hertzog and Horak**;
- 1.3. The respondent, on its part, was represented by **Mr. T.M Sedibe** from its Legal Services Directorate.

**2. ISSUE TO BE DECIDED:**

- 2.1. The question to be determined was whether or not there existed good cause / reason for condonation of the late appeal within the contemplation of item 5(2) of schedule 6 of the National Water Act (NWA) read with the provisions of Rule 4 of the Water Tribunal rules (the Rules);
- 2.2. In the event of the foregoing question being decided in the affirmative, the Water Tribunal (Tribunal) was required to condone the delay involved so as to enable the Registrar to accept the appeal and to schedule it for a hearing in due course.

**3. BACKGROUND TO THE ISSUE:**

The applicants applied unsuccessfully for permanent transfer of entitlement to water use with the decision refusing the same being made on the 24<sup>th</sup> July 2008.

The applicants, thereafter, lodged a joint appeal against the said decision per a letter dated the 19<sup>th</sup> September 2008 but posted on the 23<sup>rd</sup> September 2008 according to the post office stamp.

The said appeal was lodged after the applicants had notified the respondent of their intention to appeal per a letter dated the 25<sup>th</sup> August 2008.

The applicants were later made aware that the appeal was lodged outside the 30 (thirty) day period prescribed by section 148 (3) (b) of NWA read with the provisions of rule 4 (1)(b) of the Rules per a letter dated the 26<sup>th</sup> November 2008.

On the 9<sup>th</sup> February 2009 the applicants launched a substantive application for condonation and on the 15<sup>th</sup> May 2009 the Registrar of the Tribunal received the respondents' written opposition to the same.

The application was, eventually, heard on the 26<sup>th</sup> May 2009 and this is unanimous ruling on the same by the Tribunal.

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

No oral evidence was heard. The applicants submitted an affidavit deposed to by their director in support of the application while the respondents only submitted a written statement opposing the same.

The parties, further, made oral submissions. The deposition in favour of the application as well as submissions made by the parties are dealt with under paragraph 5 below.

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

The onus was on the applicants to show, on a balance of probabilities, that good reason as contemplated by NWA and the Rules existed for condonation.

The Tribunal was, however, not satisfied that good reason had been shown for condonation in that:-

5.1. **Degree of lateness:**

The appeal was excessively late insofar as it was some 31 (thirty-one) days late having been posted on the 23<sup>rd</sup> September 2008 when the decision was made on the 24<sup>th</sup> July 2008. Although the determinative date is the date of receipt of the appeal by the Registrar of the Tribunal, no such date was apparent *ex facie* the appeal letter and, as such, the Tribunal accepted, in the applicants' favour, that the appeal was made on the date of postage of the same viz. the 23<sup>rd</sup> September 2008.

5.2. **Reason or explanation for the delay:**

The applicants, effectively, attributed the delay involved in lodging the appeal to the fact that:

- they furnished a wrong contact address to the respondent;
- the respondent sent its decision to the said wrong address;
- they only received the decision on the 22<sup>nd</sup> August 2008;
- their director stays some 100km from Upington and, as such, could not consult with their lawyer in time for the appeal to be lodged timeously;
- their director is still actively involved in farming and their attorney has a busy schedule and it was, as such, not possible to make an appointment and consult prior to the second week of September 2008;
- the delay was largely due to the fact that they only received the decision on the 22<sup>nd</sup> August 2008 after which date their director immediately instructed their attorney of record to lodge a formal appeal.

The Tribunal was, however, not satisfied that the explanation furnished was both adequate and acceptable in, inter alia, that:

- although the wrong address furnished could have been the result of a bona fide mistake on the part of the applicants, it was not correct that the appeal was lodged timeously insofar as it was only posted on the 23<sup>rd</sup> September 2008 viz. 2 (two) days after the expiry of the 30 (thirty) day period calculated from the 22<sup>nd</sup> August 2008;
- although the applicants' director deposed that he instructed his attorney to lodge the formal appeal immediately after the 22<sup>nd</sup> August 2008, the appeal letter was dated the 19<sup>th</sup> September 2008 and bore the Post Office stamp of the 23<sup>rd</sup> September 2008;
- no full explanation was furnished as to why the applicants' director could not leave the farm to consult the lawyer at any time prior to the second week of September 2009 save for a bold statement to the effect that he is still an active farmer and the lawyer is busy;
- no specific date was disclosed on which the said director could and, in fact, consulted the attorney. The foregoing was left to speculation on the part of the Tribunal;
- if the applicants were able to furnish instructions to their lawyer with regard to the notice of intention to appeal, it was difficult to understand and no reason was provided as to why no instructions to lodge an appeal were furnished when the applicants were aware of the time frames involved;
- the formal appeal was also not comprehensive and consisted of a brief letter which could have been lodged with the Tribunal immediately after receipt of the decision.

**5.3. Prospects of success:**

The test for prospects of success is a bona fide case which prima facie carries some prospects of success (see **Chetty v Law Society (Tvl) 1985(2) SA 756(A)**).

The applicants relied, in this regard, on the fact that their applications enjoyed the support of other local and regional authorities as well as the fact that some water is available for allocation to members of previously disadvantaged communities and up-and-coming farmers. The applicants, further, cited, as a factor indicating reasonable prospects of success, the fact that one O Kruger who applied simultaneously with them was successful in his application.

As correctly submitted for the respondents, the fact that the applications were supported by local and regional authorities did not entitle the applicants, as a matter of course, to the licences applied for. The responsible authority in the

position of the respondent was still obliged to, inter alia, consider the factors set out in section 27 (1) of NWA.

The fact that one O Kruger was successful in his application did not *per se* mean that the merits of his application were the same as those of the applicants' applications. It was for the applicants to highlight the similarities in the applications.

The applicants have not made averments that, if proved on appeal, would show that the need to redress past racial and gender discrimination is in favour of the granting of the relevant licences (see generally **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (A) @ 476**).

**5.4. Prejudice:**

Prejudice, in the context of the present application and in the Tribunal's view, relates to the ability of a party to present its case fairly and properly at the appeal hearing if condonation is granted.

The Tribunal was satisfied that each party would be able to present its case properly and adequately at the appeal hearing. The foregoing was, however, not the determining factor as the Tribunal had to adopt a conspectus of all the relevant factors without emphasizing one over the others according to **Melane v Santam Insurance Co. Ltd 1962(4) SA 531 (A)** relied upon by the applicants.

In conclusion it may be mentioned that the present case was distinguishable from matters where the tardiness of a representative was to blame for the delay and a refusal of condonation would lead to failure of justice insofar as the applicants' director accepted responsibility for the delay in his affidavit (see generally **Swanepoel v Albertyn (2002) 21 ILJ 2701 (LC)** on the approach of the Labour Court in the exercise of the discretion to grant condonation in cases involving tardiness on the part of a party's representative).

The refusal of condonation herein, however, does not mean that the applicants are precluded from lodging fresh applications for licences with the responsible authority showing, inter alia, that the redress factor is not relevant to the applications or that they are B-BBEE compliant.

**6. RULING:**

- 6.1. In the result condonation is refused;
- 6.2. The file shall, therefore, be closed.



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**Lepono Lekale**  
**(Chairperson)**