

**IN THE WATER TRIBUNAL
HELD AT BLOEMFONTEIN**

REF: WT 21/06/2006

In the appeal between:

GERHARD NEETHLING

APPELLANT

AND

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

APPEAL DECISION

APPEARANCES:

Coram : Mr. L.J Lekale (Chairperson)
Dr. W Singo (Deputy Chairperson)
Mr. H. Thompson (Member)
Mr. A. S. Makhanya (Member)
Mr. A.S Hadebe (Member)

For the Appellant : **Mr. Steyn Strauss** from Naudes, Attorneys of Bloemfontein.

For the First Respondent : **Mr. Linda Qwabe** from its Legal Services Directorate in Pretoria.

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. This is a unanimous decision in the appeal hearing which was held in Bloemfontein on the 22nd of May 2009;
- 1.2. The appellant was represented by Attorney Mr. S Strauss from Naudes Attorneys of Bloemfontein;
- 1.3. The respondent, on its part, was represented by Mr. L Qwabe, from its legal directorate.

2. ISSUE TO BE DECIDED:

- 2.1. The question to be determined was whether or not there was a factual and / or legal basis for the directive issued by the respondent's Free State Regional Office against the appellant in terms of section 53(1) of the **National Water Act** (the Act);
- 2.2. In the event of the foregoing question being decided in the negative, the Tribunal was effectively required to set the directive aside.

3. BACKGROUND TO THE ISSUE:

On the 16th June 2006 the appellant duly lodged an appeal against a directive issued on the 19th May 2006. After some struggle in furnishing the reasons for the directive as required by schedule 6 item 5(3) of the Act, the respondent, eventually, provided the Tribunal with the reasons and documents relating to the directive on the 01st of August 2006.

On the 22nd of June 2006 the Registrar of the National Water Tribunal directed a letter to the respondent's Acting Director Legal Services in Pretoria, notifying him that the appeal has been lodged with the Water Tribunal against the directive issued in terms of section 53(1) of the Act.

On the 21st June 2007 the Registrar of the Tribunal directed a letter to the appellant in which she opined that the matter was ready for a hearing and afforded the appellant an opportunity to submit any further documents, if it so wished.

The matter was, subsequently, scheduled for a hearing on the 12th October 2007. After a number of postponements at the instance of the appellant the matter was, eventually, heard in Bloemfontein on the 22nd May 2009 in Bloemfontein.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced and the Tribunal only had the documents filed of record before it. Both representatives for the parties made submissions.

- Documents submitted:

- (a) The bundle prepared by the Registrar of the Water Tribunal comprising, inter alia, the appellant's appeal documents;
- (b) Exhibit "A" – A report by Leshika Consulting (Pty) Ltd.

4.2. Argument:

Mr. Strauss submitted to, inter alia, the following effect:

- (a) the increase in the height of weir 103 was aimed at the restoration of the water capacity which was already authorized;
- (b) the appellant has already applied for a licence and is awaiting the outcome

Mr. Qwabe submitted to, inter alia, the following effect:

- (a) the appellant's fault lies in increasing the heights of the weirs without authorization;
- (b) the respondent stood by its decision and believes that the directive was based on sound factual and legal position insofar as the appellant had no authorization for the water uses in question;
- (c) the documents furnished were sufficient to sustain the directive.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The appeal before the Tribunal was a hearing *de novo* in terms of item 6 (3) of schedule 6 of the Act.

The appeal was, effectively, determined on the basis of the documents properly before the Tribunal and the parties' submissions insofar as no oral evidence was adduced.

It was, inter alia, clear from the respondent's documents that:

- a site inspection was conducted on 22nd of August 2004 and 21st of February 2005 followed by the investigation which found that the

appellant was storing water unlawfully on Abramskraal 319 Portion 1 and Steenbokraal.

- the investigation found that the appellant has raised existing weirs with approximately 500mm at Abramskraal, and 800mm at Steenbokraal during 2004/2005 in the Modder River.
- the increase in the height of the weirs resulted in the appellant storing additional water.
- the increase in the original height of the weirs impede the water flow;
- the increase in the height of the weirs also alter the banks of the watercourse in which it is constructed.
- the said water uses are not licensed in terms of Section 40 of the Act. They are neither existing lawful uses in terms of Section 32 of the Act, nor generally authorised in terms of Section 39 of the Act.

Although the parties were effectively in agreement that the appellant had laudable intentions when he raised the heights of the weirs in question, it was clear that the said activities, as water uses in terms of section 21, needed authorization.

There was, thus, nothing before the Tribunal to suggest that the appellant had any legal ground for the water uses in question. In this regard it should be noted that the relevant water uses remain unlawful until and unless the licence(s) applied for by the appellant has (have) been approved.

The most plausible inferences to be drawn from the proved and / or undisputed facts before the Tribunal were that:

- the appellant did not and still does not have the required authorization;
- the directive was grounded on valid facts; and
- the directive was based on sound legal footing insofar as the onus was on the appellant to prove that he had authorization for the water uses in question but did not discharge the same.

6. DECISION:

6.1. In the result:

6.1.1. the appeal is dismissed; and

6.1.2. the directive is upheld;

6.2. The file shall, therefore, be closed.



Dr. W. Singo