

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 24/02/2010

In the appeal between:-

**GIDEON ANDERSON T/A ZONNEBLOEM
BOERDERY**

APPELLANT

and

**DEPARTMENT OF WATER AND
ENVIRONMENTAL AFFAIRS**

FIRST RESPONDENT

VUNA ENTERPRISES (PTY) LTD

SECOND RESPONDENT

APPEAL RULING

APPEARANCES

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

For the Appellant : **Adv. CE Barnard**

For the First Respondent : **Adv. MM Mojapelo** appearing with Mr.
T Mashala from Legal Services
Directorate – Pretoria

For the Second Respondent : **Adv. K Hopkins** instructed by Ms. V
Jacklin-Levin of Bouwer, Kobeli &
Morabe – Attorneys

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 21st July 2010.
- [2] The appellant was represented by **Adv. CE Barnard** while the First Respondent, on its part, was represented by **Adv. M.M Mojabelo**.
- [3] The Second Respondent was represented by **Adv. Kevin Hopkins** with the attorney Ms. V Jacklin – Levin appearing with him.
- [4] The proceedings were recorded mechanically on 2 (two) audio tapes.

ISSUE TO BE DECIDED:

- [5] The preliminary question raised by the Second Respondent is whether or not the appellant has **locus standi** to lodge an appeal in terms of section 148(1)(f) of the Nation Water Act (the NWA).
- [6] In the event of the foregoing question being decided in the affirmative, the next enquiry is whether or not the Second Respondent is entitled to a water use licence which it applied for in terms of section 40 read with section 41 of the NWA.

BACKGROUND TO THE ISSUE:

- [7] The Second Respondent applied successfully for a water use licence granted on the 9th December 2009 in respect of its mining operations which border and are being carried out in the immediate vicinity of a portion of the appellant's farm in Mpumalanga.
- [8] Prior to the granting of the relevant licence the appellant communicated his concerns to both respondents in writing on a number of occasions.
- [9] The appellant only became aware of the relevant licence on the 20th January 2010 when it received a letter from the First Respondent in response to his letters of the 4th and 18th November 2009.

- [10] On the 19th February 2010 the appellant lodged an appeal against the decision of the First Respondent to grant the said licence.
- [11] On the 19th July 2010 the Second Respondent submitted its Statement of Defence in terms of which it effectively raised a defence of lack of **locus standi in judicio** against the appellant which has to be determined **ante omnia** as a point in limine.
- [12] On the 21st July 2010 the appeal hearing was, therefore , limited to the said preliminary issue.

SURVEY OF EVIDENCE AND ARGUMENT:

- [13] No oral evidence was adduced with the following documents being submitted and admitted for the sake of convenience and ease of reference:-

[13.1] Exhibit "A" : The appellant's bundle of documents;

[13.2] Minutes of Pre-Trial conference;

[13.3] Appellant's Heads of Argument.

- [14] **Adv. Barnard** submitted to the following effect, among others:

[14.1] that although the appellant never submitted any document titled objection to the First Respondent, it effectively, objected in terms of several letters which it directed to both respondents prior to the relevant decision being made;

[14.2] that such an objection was made timeously insofar as it was constructively made within a reasonable time before the relevant decision was made;

[14.3] that section 148(1)(f) of the NWA confers the right to appeal to anyone who has objected and the relevant objection does not have to be preceded by a notice or invitation published in terms of section 41(4) of the NWA;

[14.4] that the appellant was never placed in possession of relevant documents despite several requests therefor

from him and the First Respondent, further, did not exercise its discretion in favour of inviting any comments as provided by section 41(2)(c) of the NWA.

[15] On behalf of the First Respondent **Adv. Mojapelo** submitted to, inter alia, the effect that:

[15.1] although the appellant did participate in the process leading to the issuing of the relevant licence, he did not submit any formal objections;

[15.2] it is possible that the appellant is not an objector within the contemplation of section 148(1)(f) of the NWA;

[15.3] the First Respondent does not pursue the issue strongly and leaves the decision in the hands of the Tribunal;

[15.4] it is very difficult to determine what is contemplated by the Legislature in section 148(1)(f) of the NWA;

[16] **Adv. Hopkins** submitted to the following effect among others:

[16.1] although the Second Respondent raised the relevant preliminary point it wished to see the matter being decided on merits so as to avoid a further appeal to the High Court on a question of law;

[16.2] to the foregoing extent the Second Respondent is prepared to allow the appellant access to the documents he complains about not receiving and to allow the matter to be postponed for that purpose;

[16.3] an interpretation which restricts appeals to formal objections is untenable;

[16.4] the relevant point in limine was only raised because, **ex facie** the appellant's papers, it appears that it does not have **locus standi** to lodge an appeal.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [17] The onus is on the appellant, as **dominus litis**, to prove that he has the necessary authority or right to launch the current proceedings.
- [18] It is common cause that no objections were invited and no formal objection was submitted by the appellant.
- [19] The parties are, further, in agreement that the appellant communicated with the respondents in writing and raised his concerns.
- [20] The real question to be determined is whether or not the letters directed by the appellant to the respondents constitute a **written objection** lodged timeously against the water use application for the purposes of section 148(1)(f) of the NWA.
- [21] The issue, therefore, concerns proper construction of section 148(1)(f) of the NWA which reads as follows:

“S 148(1) There is an appeal to the Water Tribunal –

...

(f) against a decision of a responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection against the application.”

- [22] **Adv. Barnard** contends that the proper interpretation of the relevant section is to the effect that any written objection lodged within a reasonable time before the relevant decision was made suffices for the purposes of clothing the objector with the right to appeal against such a decision regardless of the wording of such an objection.
- [23] A close scrutiny of the relevant section and the whole appeal scheme of NWA reveals that what is envisaged is the following:
- [23.1] appeals may only be lodged by the persons mentioned in section 148(1) of NWA;

- [23.2] 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 or to which section 41 of NWA applies and any person who lodged a written objection against such an application timeously;
- [23.3] 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**)
- [23.4] such a notice inviting objections can only be given by the applicant if required by the responsible authority to do so;
- [23.5] NWA does not define the word “**timeously**” and such a word is only used in relation to an “**objection**” in section 148(1)(f) while section 41(4) gives an applicant the power to determine the relevant time period within which objections may be made subject to certain timeframes;
- [23.6] reference to “**timeously lodged**” indicates that an objection contemplated by section 148(1)(f) should always be made within a pre-determined or prescribed time period;
- [23.7] only section 148(1)(f) bestows the right to appeal to an objector. All other sub-sections of section 148(1) refer to “**affected persons**”;
- [23.8] section 148(1)(f) extends that right to appeal to an objector against an application made “**under section 41, or any other application to which section 41 applies**”;
- [23.9] reference to “**application**” in the phrase “**or by any other person who has timeously lodged a written objection against the application**” is reference to an application made under section 41 or any other application to which section 41 applies;
- [23.10] section 41(4) deals with objections and, as such, only section 41 and no other section of NWA grants the right to object under certain circumstances;

- [23.11] section 148(1)(f) should be read with section 41(4) for the purposes of identifying the objector contemplated therein;
- [23.12] an objection contemplated by section 148(1)(f) of NWA should always be preceded by a notice inviting objections and prescribing the time period within which such objections may be lodged.
- [24] In the present matter no written objections were invited and subsequently made as contemplated by section 41(4) of NWA and, as such, the right to appeal against the First Respondent's decision on a section 41 application made by the Second Respondent did not arise in favour of any objector.
- [25] Although the parties generally appear to be **ad idem** that the appellant was an objector, he was, in the Tribunal's view, not an objector contemplated by section 148(1)(f) of NWA.
- [26] It is clear from the material properly before the Tribunal that the First Respondent, **qua** the responsible authority, never required the Second Respondent to publish a notice inviting objections.
- [27] Where a party feels aggrieved by a decision and / or the manner in which a decision was made by the responsible authority and such a party does not have the right to appeal to the Water Tribunal against such a decision, such a party, in the Tribunal's view, is free to explore other legal avenues available to him such as having recourse to the High Court.

RULING:

- [28] In the result the appellant does not have the right to lodge an appeal with the Water Tribunal in terms of S 148(1)(f) of NWA.
- [30] The file shall, therefore, be closed.

DATED AT PRETORIA ON THIS *20th*..... DAY OF AUGUST 2010.

L. J. Lekale

**L.J LEKALE
(Chairperson)**