

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 04/08/2008

In the matter between:-

H.S HUMAN & 19 OTHERS

APPLICANTS

and

**THE MINISTER OF WATER AFFAIRS AND
FORESTRY**

FIRST RESPONDENT

DEBORAH MOCHOTHLI N.O

SECOND RESPONDENT

CONSOLIDATION RULING : DATE 19-01-2009

APPEARANCES:

Coram : Mr. L.J Lekale - Chairperson
Dr. W Singo - Deputy Chairperson
Mr. Hubert Thompson - Member
Mr. A.S Hadebe – Member
Mr. A.S Makhanya - Member

For the Applicants : Adv. J.P Verster instructed by Mr. Danie Barnard from
Barnard & Kahn - Attorneys

For Respondents : Adv. M. Mojapelo instructed by State Attorney - Pretoria

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. This is unanimous ruling in the application for consolidation of appeals heard in Pretoria on the 14th January 2009;
- 1.2. The applicants were represented by **Adv. J.P Verster** instructed by **Barnard & Kahn, Attorneys** of Pretoria;
- 1.3. The respondents, on their part, were represented by **Adv. M. Mojapelo** instructed by **State Attorney**, Pretoria.

2. ISSUE TO BE DECIDED:

- 2.1. The preliminary question to be determined was whether or not the Water Tribunal had jurisdiction to entertain the application regard being had to whether or not:
 - there existed proper appeals before the Tribunal for consolidation purposes.
- 2.2. In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not the absence of consent to consolidation on the part of respondents was not a bar to the granting of the application;
- 2.3. In the further event of the question in 2.2. above being decided in the affirmative, the Tribunal was required to consolidate the appeals so as to make them to be heard together within the contemplation of Rule 10 of the Water Tribunal rules.

3. BACKGROUND TO THE ISSUE:

The 20 (twenty) applicants delivered an application for consolidation on or about the 23rd July 2008 alleging that they made individual applications for permanent transfer and licensing of existing lawful water uses on the 22nd March 2006.

The applicants, further, alleged that their respective applications were, eventually, refused during June 2008.

The application was, eventually, scheduled for a hearing on the 14th January 2009.

At the commencement of the hearing the Tribunal, *mero motu* required the applicant party to satisfy it that it had the requisite jurisdiction to entertain the application by showing, inter alia, that the individual applicants noted appeals that needed to be consolidated.

4. SURVEY OF EVIDENCE AND ARGUMENT:

No oral evidence was adduced. The parties made oral submissions and the applicant party, further, submitted written argument.

4.1. Applicant's submissions:

Mr. Verster submitted to, inter alia, the following effect both in writing and verbally:

- (a) the application is brought in terms of Rule 10 of the Water Tribunal Rules (the rules) published in September 2005;
- (b) in all the appeals and applications the same common question of fact and / or law arises; and / or
- (c) it will be practical and appropriate to proceed with, hear and decide the relevant appeals together in order to avoid piecemeal and unnecessary hearings;
- (d) from November 2006 to and including January 2007 thirteen (13) of the 33 individual applications for transfer and licensing of existing lawful water uses were granted;
- (e) between March 2008 and June 2008 the applications of the applicants involved herein were disapproved after they were invited to make representations within 90 (ninety) days as to why the applications should not be disapproved;
- (f) the disapprovals came about notwithstanding the fact that they required representations were made;
- (g) all appeals were noted in one document as a joint or collective appeal;
- (h) the said practice as well as the practice of applying for consolidation forthwith and not after noting an appeal or appeals is common in the High Court;
- (i) the foregoing happens when the applicant(s) is or are aware that the issues involved are the same;
- (j) the respondents were asked for consent to consolidation but their response was that they could not decide on that issue before hand and that the application should first be lodged;
- (k) all the appeals were lodged within the prescribed 30 (thirty) day period and, in any event, the issue as to whether or not they were lodged timeously is part of the merits of each appeal and falls to be decided only at the appeal hearing stage;
- (l) the rules do not make provision for the aforesaid practice;
- (m) it is, however, trite that in such circumstances the uniform rules of the High Court are applicable;

- (n) it was waste of time and bad law to expect the applicants in this matter to note separate appeals;
- (o) the rules of the High Court further provide for an application for consolidation to lie to the court where any party withholds consent;
- (p) Rule 10 is not subject to the provisions of Rule 3 of the rules.

4.2. The respondent's submissions

Mr. Mojapelo submitted to the following effect, among others:

- (a) there were no individual appeals noted for consolidation purposes;
- (b) Rule 3 of the rules lays down the procedure for noting an appeal;
- (c) an appeal has to be noted in the prescribed form;
- (d) what is envisaged by Rule 3 is that an appellant or its representative would sign and note an appeal;
- (e) there are no proper appeals before the Tribunal for consolidation purposes;
- (f) there was no approach for agreement on consolidation made to the respondents;
- (g) there were supposed to be 20 (twenty) applicants before the Tribunal with 20 (twenty) appeals having been lodged;
- (h) in an appropriate case, where appeals have been properly noted, the respondents would not usually object to consolidation because of, inter alia, the obvious advantages and convenience associated therewith.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The onus was on the applicants to prove that the Tribunal had the requisite jurisdiction to entertain the application by showing that:

- there was a number of appeals before the Tribunal;
- the said appeals were appeals contemplated by section 148 and item 5 of Schedule 6 of the National Water Act (the Act) read with the provisions of Rule 3 of the rules.

Common Cause:

The parties were, effectively, in agreement that:

- the individual applicants lodged individual applications in terms of section 25 (2) of the Act;
- each application was decided upon individually and on a specific date;
- the applicants did not note individual appeals with the Tribunal;
- a document headed **Notice of Appeal** was delivered and it was stated that the appeal was in terms of “**section 10**” of regulation 926 dated the 23rd of September 2005;

DISPUTE:

The real dispute between the parties was limited to the following question of fact and / or law:

- * whether or not the existence of a number of separate and proper appeals viz. 20 (twenty) separate appeals, was a jurisdictional fact for the entertainment, by the Tribunal, of an application for consolidation.

FINDINGS:

When all was said and done, the Tribunal was satisfied, on available material and applicable law, that:

- the Water Tribunal is as much a creature of statute as the Magistrates’ Courts are. It can, therefore, not do anything which is not contained within the four corners of its enabling Act (the Act) in the same way as the Magistrates’ Courts cannot do anything which the Magistrates’ Courts Act does not specifically authorize them to do (see **Ndamase v Functions 4 All 2004 (5) SA 602 (SCA) @ 605 F-A**);
- reference to section 10 in the Notice of Appeal was, in fact, reference to Rule 10 of the Water Tribunal rules;
- as correctly contended for the respondents, Rule 10 envisages that, for the purposes of consolidation there should be a number of appeals before the Tribunal;
- such appeals should be appeals contemplated by section 148 and item 5 of schedule 6 of the Act read with the provisions of Rule 3 of the rules. In the foregoing regard it should be noted that item 5(2) of Schedule 6 of the Act authorises the Tribunal to condone the late lodging of an appeal for good reason while Rule 3 of the rules provides for the form and manner in which an appeal should be noted;
- an appeal lodged or noted in accordance with the Act and the rules is, thus, a proper appeal;
- a proper appeal in terms of the Act and the rules is one which was lodged within the prescribed time period;

- it follows, therefore, from the foregoing that, contrary to Mr. Verster's submission, the question as to whether or not an appeal was noted timeously falls to be determined *ante omnia* and not as part of the merits;
- the Act is silent on consolidation and only the rules provide for the same;
- the Tribunal is bound to apply and follow its rules where they provide for a point at issue as was held by Innes C.J in **Wilson v Gandy 1907 T5249 @ 250** where it was said: **"In regard to matters upon which the Proclamation does touch, the magistrates should keep within the term of the statute"**;
- insofar as Mr. Verster effectively submitted that the rule in question provided for bad law, it was not for the Tribunal to decide upon that issue as it was bound to apply and follow the rules unless and until they have been amended or declared invalid by the High Court;
- the existence of separate proper appeals is a *sine qua non* for the entertainment of an application for consolidation in terms of Rule 10;
- although the Act and the rules do not expressly prohibit the noting of several and separate appeals in one document, the appeals have to be separate or distinct in the sense that each bears its own separate case number;
- Rule 11 of the uniform rules of the High Court provides for consolidation of separate actions that have been instituted if it appears to the court that it is convenient to do so;
- the aforesaid rule appears to envisage that consolidation in the High Court will only take place after separate actions have been instituted.
- the rules make provision for consolidation and, as such, there existed no cause for the Tribunal to seek guidance from the rules of the High Court;
- the doctrine of implied jurisdiction did not arise because the rules were not silent on the issue of consolidation. In this regard it should be noted that the said doctrine only arises where the empowering statute is silent on the ancillary powers which are necessary to enforce the jurisdiction that has been specifically conferred (see **Wilson v Gandy (supra)**).
- the manner in which the Notice of Appeal herein was framed indicates that what was, most probably, intended by the applicants was a joinder of the parties as opposed to consolidation which can only take place after the actions or appeals have been instituted or noted;

In conclusion the Tribunal was of the view that the applicants used Rule 10 to bring a joint or collective appeal in circumstances where the said rule does not provide for

joinder of the appellants. Unlike Rule 10 of the Uniform rules of the High Court and section 41 of the Magistrates' Courts Act that, effectively, provide for joinder of plaintiffs in one action if their right to relief depends upon the determination of some question of law or fact which, if separate actions were instituted, would arise in each action, the Act and the rules in casu do not provide for such an event.

6. **RULING:**

- 6.1. In the premises the Water Tribunal does not have jurisdiction to entertain the application herein until and unless separate proper appeals have been noted;
- 6.2. The application is, thus, dismissed.



L.J. LEKALE

I concur.



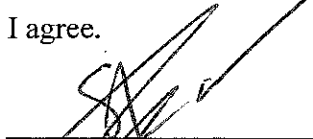
Dr. W. Singo

I agree.

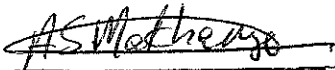


H. Thompson

I agree.



A.S. Hadebe



A.S. MATHAWYA

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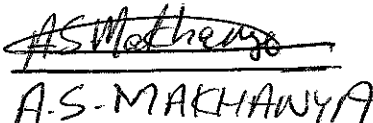
I agree.



H. Thompson

I agree.

A.S Hadebe



A.S. MAKHANYA