IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO. WT 25/05/2009

In the appeal between:-

HENDRIK PETRUS NEL APPELLANT

and

THE DEPARTMENT OF WATER AFFAIRS RESPONDENT

APPEAL DECISION: 28-06-2010

APPEARANCES:

Coram	:	LJ Lekale (Mr) – CHAIRPERSON Dr W Singo – Deputy Chairperson Mr. AS Makhanya – Member Mr. H Thompson – Member
For the Appellant	:	Mr. Pieter-Schalk Bothma from Werkmans Inc Jan S de Villiers – Paarl
For the Respondent	:	Mr. T Sedibe from the Respondent's Legal Services Directorate - Pretoria

DETAILS OF HEARING AND REPRESENTATION:

[1] The appeal hearing was held at Pretoria on the 9th June 2010.

[2] The appellant was represented by **Mr PS Bothma** from a firm of Attorneys **Werkmans Incorporating Jan S de Villiers of Paarl**.

[3] The respondent, on its part, was represented by **Mr. T Sedibe** from its **Legal Services Directorate in Pretoria**.

[4] The proceedings were recorded mechanically on 2 (two) audio tapes.

ISSUE TO BE DECIDED:

[5] The preliminary question effectively raised by the respondent in its closing statement is, in effect, whether or not the appellant's licence application under section 41 of the National Water Act (NWA) is for the use of water from the same resource as the one to which the proposed facilitative entitlement transfer relates.

[6] In the event of the aforegoing question being decided in the affirmative, the next enquiry is whether or not the appellant is entitled to the relevant water use licence regard being had to either of the following salient questions of fact and / or law:

[6.1] whether or not, in the light of a copy of an auditor's certificate dated the 19th February 2009, the appellant is an Exempted Micro Enterprise (EME) in terms of the AgriBEE; or

[6.2] whether or not a decision that the appellant is entitled to the relevant licence strikes a reasonable equilibrium between all the relevant factors inclusive of those set out in section 27(1) of NWA.

BACKGROUND TO THE ISSUE:

[7] The appellant applied unsuccessfully for a water use licence in terms of section 41 read with section 25(2) of NWA with the decision refusing the licence being made on the 13th February 2009.

[8] On the 12th March 2009 the appellant requested reasons for the said decision and same were given on the 15th April 2009 as being the fact that the application does not promote the redress of the past racial and gender discrimination **"based on the provisions of the National Water Act ...read with Broad-Based Black Economic Empowerment ...and the AgriBEE charter as published on the 20th March 2008 in Government Gazette no. 30886"**.

[9] The appellant felt aggrieved by the decision and lodged an appeal on the 15th May 2009.

[10] At the hearing of the matter the appellant party submitted Heads of Argument and, further, produced a copy of a letter dated 19th February 2009 from the auditors to the effect that its annual income does not exceed RSM R5 000 000-00 (Five Million Rand).

[11] The respondent, on its part, adduced oral evidence and presented verbal submissions.

[12] In its closing statement the respondent party, inter alia, effectively submitted that the provisions of section 25(2) of NWA prohibits the envisaged transfer of water use entitlement aimed at facilitating the granting of the relevant licence because the agreement between the appellant and the proposed transferor seeks to transfer water from the Great Fish River to Sundays River wherefrom the appellant would take the water.

[13] On his part, the appellant effectively contended, through his representative, that the fact that he seeks to take water from the Great Fish River to the Lower Sundays River and eventually to his property does not offend the provisions of section 25(2) of NWA.

[14] The Tribunal regards the relevant issue as a point **in limine** which needs to be determined **ante omnia** because, in the exercise of its wider appeal jurisdiction, the Tribunal hears the matter **de novo** and, on the facts of the present matter, can only entertain the merits of the matter if the application complies with the provisions of section 25(2)(a) of NWA as a point of departure.

SURVEY OF EVIDENCE AND ARGUMENT:

[15] **MOSES SIPHO SKOSANA** testified under oath to, inter alia, the following effect on behalf of the respondent party:

[15.1] he is the Director: Water Use and the relevant application went through his directorate in the process of its consideration by the Chief Director: Water Use as the authority delegated to consider such applications.

[15.2] In deciding on the application all the relevant factors were considered including the Broad-Based Black Economic Empowerment Act and the Codes of Good Practice made in terms thereof;

[15.3] when the decision was made on the 13th February 2009 the responsible authority was not aware that the appellant was an Exempted Micro Enterprise (EME) in terms of the AgriBEE because the letter relied upon by the appellant in this regard only came into existence after the fact viz. on the 19th February 2009;

[15.4] NWA requires applications for water transfers to be dealt with as applications for new licences;

[15.5] the responsible authority struck a reasonable equilibrium between all the relevant factors and did not single out the section 27(1)(b) factor;

[15.6] in terms of the National Water Resource Strategy (NWRS) of September 2004 a water transfer is allowable if it is made from the same water resource;

[15.7] the reasons for the decision are only those that are set out in the letters sent to the appellant;

[15.8] had the letter relied upon by the appellant as proof that he is an EME served before him before the decision was made he would, possibly, have come to a different decision and recommendation;

[15.9] the practical effect of the proposed transfer is that Great Fish River would yield water to Sundays River from whence the appellant would draw the same for irrigation purposes;

[15.10] 2(two) different catchment areas are involved with the appellant falling under the jurisdiction of the Lower Sundays River Irrigation Board.

[16] **Mr. Bothma** for the appellant submitted both in writing and verbally to the following effect, among others:

[16.1] the interpretation attached to the provisions of section 25(2) of NWA by the respondent is not correct;

[16.2] on proper construction of the said provisions the proposed transfer is not in violation of the relevant provisions because they do not prohibit transfer of water from one resource to another catchment area;

[16.3] according to the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004(4) SA 490 (CC)** all the relevant factors should be considered and the decision of the decision-maker in the position of the respondent must strike a reasonable equilibrium between the different factors;

[16.4] the respondent, as the responsible authority, should not fetter its discretion by adopting a rigid decision-making process which does not take the circumstances of each particular case into account;

[16.5] an application for a water use licence made as part of the transfer of an existing water use entitlement should not be evaluated on the same basis as applications for unallocated water where different factors may be afforded greater weight;

[16.6] the original auditor's certificate relating to the appellant's status as EME is in safe-keeping with the auditors in Cradock and it is not necessary to insist on the same because its authenticity is not in dispute;

[16.7] the appellant has done a lot to improve the lives of previously disadvantaged people as set out in the notice of appeal and the granting of the licence would result in the achievement of the purpose of NWA and would give effect to the objectives of NWA in that it will contribute to the promotion of **"the efficient, sustainable and beneficial use of water in the public interest"** and to the facilitation of **"social and economic development"** as required by section 2 (d) and (e) of NWA;

[16.8] the central issue is how much weight should be allocated to the section 27(1)(b) factor.

[17] **Mr. Sedibe** submitted to, inter alia, the following effect:

[17.1] the document from the auditors is a copy and the author of the same was not called as a witness;

[17.2] the document in question is not a certificate because the author did not authenticate the same;

[17.3] section 25(2) of NWA restricts the transfer of water use licence to the same water resource and in **casu** the transfer sought is from one catchment area to another;

[17.4] the application could, as such, not succeed;

[17.5] section 40(4) of NWA gives the responsible authority in the position of the respondent the discretion to decline to consider an application for the use of water to which the applicant is already entitled by way of an existing lawful water use or under a general authorization.

[17.6] all the relevant factors were considered and the decision is correct and based thereon.

ANALYSIS OF EVIDENCE AND ARGUMENT:

POINT IN LIMINE:

[18] Section 25(2)(a) NWA provides that:

> **"(2) A person holding an entitlement to use water in respect of any land may surrender that entitlement or part of that entitlement –**
>
> **(a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land".**

[19] The thrust of the aforegoing section is, in the Tribunal's view, that the water use licence application sought to be facilitated by the surrender should be in respect of the same water resource as the one to which the entitlement to be transferred relates.

[20] Whether or not the appellant is in the same catchment area as the intended transferor appears not to be the issue for the purposes of section 25(2)(a) of NWA.

[21] As correctly and effectively submitted by Mr. Bothma, the entitlement to be transferred and the application for the water use licence are required by the relevant section to be in relation to the same water resource. The hallmark in the section falls on the words "**from** the same resource".

[22] The factual question, therefore, is whether or not the application herein relates to the Great Fish River insofar as the entitlement in question entitles the transferor viz. the HJB Nel family Trust to use water from the Great Fish River.

[23] The letter communicating the decision of the respondent on the application to the appellant dated the 13th February 2009 states that:

> **"... it is with regret to inform you that your licence application for the taking of water from the Remaining Extent of Erwe 38 and 19 of Great Fish River Settlement to the Remaining Extent of Farm 641 was not successful"**

[24] The application, therefore, relates to the Great Fish River and so is the entitlement held by the HJB Nel Family Trust.

[25] It is, thus, clear to the Tribunal that, for the purposes of section 25(2) of NWA, both the entitlement sought to be surrendered and the application sought to be facilitated by the surrender relate to the same resource.

[26] The Tribunal, therefore, answers the preliminary question in the affirmative and embarks on the next enquiry into whether or not the appellant is, in law and on the facts, entitled to the licence he applied for.

Exemption in terms of AgriBEE:

[27] The appellant contends that he is an EME in terms of the AgriBEE Sector Charter in that his annual turnover does not exceed R5 million. In support of this contention Mr. Bothma submitted a copy of a letter from the accountants.

[28] Mr. Sedibe for the respondent, however, effectively submits that the said document cannot be relied upon because it is a copy and its author was not called to testify in authentification of the same. He maintains, in effect, that the appellant is not exempted from the scope of application of AgriBEE.

[29] On behalf of the appellant Mr. Bothma pointed out that the original letter is in safekeeping with the accountants in Cradock. In his view, it is not necessary to insist on the original document because the integrity of the auditor is not in question and, further, that if the Tribunal so wishes it may be produced.

[30] It is clear to the Tribunal, from Mr Bothma's conduct and submissions during the proceedings, that he is a very competent and thorough lawyer who is, obviously, familiar with, inter alia, the law of evidence. It is, thus, up to him and not the Tribunal to decide on the best way to present the appellant's case properly, adequately and in accordance with applicable law.

[31] Like the best evidence rule in civil proceedings, the general rule in terms of the common law requires that, when the contents of a documents are proved, the original document, if available, be produced as evidence.

[32] The said rule is known as the primary evidence rule and was stated as follows by **Van Blerk AJ in R v Van der Merwe 1952(1) SA 143 (SWA) 144g** with reference to **R v Amod & Co (Pty) Ltd 1947 (3) SA 32 (A) @ 40**:

> **"Die algemene reel ... is dat wanneer die inhoud van 'n geskrif bewys moet word die geskrif self voorgelé moet word, en dat sekondére getuienis van die inhoud daarvan slegs dan gegee kan word wanneer die oorspronklike vernietig is of verlore geraak het en na behoorlike gesoek daarna nie gevind kan word nie"** – (the general rule ... is that when the content of a document is proved, the document itself must be produced and that secondary evidence of its content can be given only if the original has been destroyed or lost and cannot, after proper search, be found – literal translation).

[33] The relevant copy of the letter or certificate was submitted as proof that the appellant is an Exempted Micro Enterprise (EME). The respondent party effectively disputed its contents insofar as Mr. Sedibe challenged the same and contented that the decision of the respondent was correct and should prevail.

[34] The original letter according to Mr. Bothma is still in existence and in safe-keeping with the auditor in Cradock. The reason why it was not made available to the Tribunal at the hearing is not clear. In this regard it should be noted that the appellant knew as early as the 15th May 2009 at the very earliest that he intended to rely on the relevant letter in his appeal.

[35] The relevant letter is dated the 19th February 2009 and it is clear from that fact that the appellant had ample opportunity to secure the original for presentation at the appeal hearing.

[36] No acceptable reason has been furnished for the non-production of the original letter. There appears, therefore, to exists no reason in law for the Tribunal to accept secondary evidence of contents of the relevant letter or certificate in the light of Mr Sedibe's challenge.

[37] Even if the Tribunal is wrong in the aforegoing finding, the Tribunal is not persuaded by the relevant document to find that the appellant is, as at the date of the appeal hearing, an EME for the purposes of AgriBEE. This is borne out by the following, among others:

[37.1] a letter or certificate seeking to exclude the appellant from the scope of application of AgriBEE must, in the Tribunal's humble view, demonstrate sufficient facts to show that the appellant's 5 year moving average or annual turnover is less than R5 million as at the date of the application or the appeal hearing, whichever is applicable;

[37.2] the relevant copy only makes a bold statement to the effect that **"Mr Nel's yearly income does not exceed R5 000 000-00 (Five Million Rand)"** without disclosing:

(a) whether or not it refers to his enterprise viz. Lekkerbly Boerdery or to his personal income which he derives from, inter alia, Lekkerbly Boerdery as an enterprise;

(b) the exact average or annual turnover of the enterprise;

[37.3] it is necessary for the Tribunal to make its own conclusion on whether or not the appellant is an EME for the purposes of AgriBEE. The Tribunal cannot rely on the

ipse dixit of the auditors without the benefit of hearing the auditors out on the issue or gleaning the relevant facts from the relevant document. The fact that the appellant is an EME must be apparent ex facie the relevant document where no oral evidence is adduced to prove the same.

[37.4] the relevant document is dated the 19th February 2009 and only certifies the appellant's status as at that date. More than a year has lapsed since the date of the said letter as at the date of the appeal hearing. In other words a full financial year has passed between the appeal hearing and the date of the document in question. It is, thus, possible that the appellant's turnover has changed either for the worse or the better in the meantime. The actual 5 year moving average or annual turnover of the appellant, as at the date of the appeal hearing, is simply not before the Tribunal;

[37.5] the determinative date, in the Tribunal's view, is the date of the appeal hearing and not the date of the application because the relevant document was generated after the decision was made by the respondent on the application viz. the 13th February 2009 and the document is being entertained by the Tribunal in terms of its wider appeal jurisdiction when it deals with the matter as a rehearing.

EQUILIBRIUM BETWEEN RELEVANT FACTORS:

[38] As correctly submitted for the appellant by Mr. Bothma, transformation may be achieved in many ways and NWA does not stipulate the ways in which such a redress may be achieved.

[39] Again as correctly pointed out by Mr. Bothma, the Constitutional Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others **(supra)** has held that **"the manner in which**

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transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker".

[40] It is clear from the evidence of Mr. Skosana and the written reasons furnished by the respondent that the respondent, as the decision-maker, has chosen AgriBEE as advising the manner in which transformation is to be achieved as far as access to water is concerned.

[41] The laudable steps taken by the appellant to improve the lives of his employees from previously disadvantaged groups appear, unfortunately, to fall short of the 7 (seven) elements of empowerment set out in AgriBEE. In this regard the Tribunal can only note that, even during the darkest days of apartheid, many black people, in particular, were employed as labourers on farms owned by white people.

[42] There is nothing before the Tribunal, regard being had to AgriBEE, showing that a decision that the appellant is entitled to the relevant licence is a reasonable equilibrium between all the relevant factors.

DECISION:

[43] In the premises the appeal fails and the file shall be closed.

DATED AT PRETORIA ON THIS 28th DAY OF JUNE 2010.

LJ LEKALE
(Chairperson)