

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 21/09/2009

In the appeal between:-

HENDRIK SAND VAN HEERDEN (PTY)LTD APPELLANT

and

**THE MINISTER OF WATER &
ENVIRONMENTAL AFFAIRS**

RESPONDENT

CONDONATION RULING: DATE

APPEARANCES

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

For the Appellant : **Adv. JHA Saunders** instructed by
Potgieter, Penzhorn & Taute-Attorneys
of Pretoria

For the Respondent : **Mr. T Sedibe** from its Legal Services
Directorate in Pretoria

DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was scheduled to take place in Pretoria on the 13th May 2010.
- [2] The appellant was represented by **Adv. JHA Saunders** instructed by Messrs. Potgieter, Penzhorn & Taute – Attorneys of Pretoria.
- [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 1(one) audio tape.

ISSUE TO BE DECIDED:

- [5] The preliminary question to be determined is whether or not good reason exists for condonation of the late lodging of the appeal within the contemplation of item 5 (2) of Schedule 6 to the National Water Act (NWA) read with the provisions of Rule 4(4) of the Rules of the Water Tribunal.
- [6] In the event of the foregoing question being decided in the affirmative, the Tribunal is required to condone the late lodging of the appeal and to direct the Registrar of the Water Tribunal to reschedule the matter for the hearing of the appeal.

BACKGROUND TO THE ISSUE:

- [7] On the 16th September 2009 the appellant lodged an appeal against a directive issued by the respondent, through its regional office in the Free State, dated the 9th October 2008 and signed on the 3rd October 2008.
- [8] The appellant, further, requested condonation of the late lodging of the appeal and annexed an affidavit in support of the same to the Notice of Appeal.
- [9] The matter was, eventually, scheduled for a hearing on the 13th May 2010 with the respondent having submitted the documents

contemplated by item 5 (3) of Schedule 6 to NWA on the 10th May 2010.

- [10] At the commencement of the hearing the respondent indicated that it was opposing the application for condonation. The appellant party, thereupon, protested bitterly against the fact that the respondent had not announced or notified its intention to oppose as well as the grounds therefor well in advance so as to give the appellant a fair opportunity to deal with the same.
- [11] The parties, eventually, agreed to exchange documents and / or written submissions not later than the 11th June 2010.

SURVEY OF EVIDENCE AND ARGUMENT:

- [12] The appellant's director, **WILLEM NICHOLAAS VAN HEERDEN**, deposed to the following effect, among others:
- [12.1] on the 9th May 2008 the respondent's Bloemfontein office directed a letter to the appellant requiring it to register certain water uses in terms of the regulations;
- [12.2] the appellant's erstwhile attorney consulted with the relevant office on the 10th September 2008 and, eventually, furnished the required documents proving existing lawful uses under cover of a letter dated the 2nd October 2008;
- [12.3] the appellant's said attorney followed up with a letter dated the 3rd November 2000. A response thereto was only received by way of a letter dated the 31st March 2009 which stated the respondent's unequivocal position with regard to the letter of the 3rd October 2008 which purported to be a directive;
- [12.4] from the 24th April 2009 to and including the 2nd September 2009 the applicant applied for and secured extensions of time for commencing appeal proceedings with the last 30 day extension being granted by the relevant office per a letter dated the 4th September 2009;

- [12.5] the letter purporting to be a directive is vague and / or ambiguous insofar as it gave the applicant 10 (ten) working days to submit any authorization or documentation to prove the legality of the specified water uses;
- [12.6] the appellant is a lay person who relied solely on its lawyers in the matter.
- [13] On behalf of the respondent, a Director in the Chief Directorate, Legal Services, **NTHSENGE CHARLSON RAPHADANA**, deposed to, inter alia, the following effect:
- [13.1] the Water Tribunal does not have jurisdiction over issues relating to the Promotion of Administrative Justice Act, 2000 (PAJA);
- [13.2] there is no basis for the appellant's contention that the directive is vague and embarrassing;
- [13.3] the appellant's contention that the directive is unfounded in law is in direct conflict with the provisions of section 161(1) of NWA;
- [13.4] there existed no justifiable reasons for the appellant to fail to commence the appeal for a period of more than 10 (ten) months;
- [13.5] NWA is clear as to when an appeal to the Water Tribunal should be lodged;
- [13.6] the appellant's new attorney of record further delayed the commencement of the appeal by requesting a further extension in spite of the clear and simple language used in the pre-directive notice as well as the directive itself.
- [14] In the Heads of Argument Adv. Saunders for the appellant contends, inter alia, that:
- [14.1] the purported directive is conditional and the only interpretation that can be accorded to it is that, should the appellant supply the information it deems necessary, it may proceed with using the water if it is of the opinion that it is entitled to the water in question;

- [14.2] the appellant was of the opinion that it had already complied with the relevant condition and supplied the relevant documentation and, as such, it served no purpose to appeal the purported directive as it would only become effective should the documentation not be supplied;
- [14.3] the relevant office of the respondent created the impression that it had authority to grant an extension for the period within which the appellant may file its appeal;
- [14.4] Water Law is a specialized part of law and not even the respondent's officials seem to be **au fait** with the relevant provisions of NWA;
- [14.5] the appellant lodged the appeal within 7 (seven) days after receiving proper advice from counsel.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [15] The onus is on the appellant, as the applicant for condonation, to prove on a balance of probabilities that good reason exists for condonation.
- [16] In deciding whether or not an applicant for condonation has discharged the foregoing burden, the Tribunal has to consider the following, among others:
- [16.1] degree of lateness;
- [16.2] reason for the delay involved;
- [16.3] prospects of success in the appeal;
- [16.4] prejudice to the respondent; and
- [16.5] importance of the matter.

(see Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A))

[17] It is clear from available evidence that the delay involved in lodging the appeal is excessive insofar as the directive was issued on the 3rd October 2008 and served on the appellant on the 9th October 2008. The appeal was only lodged on the 16th September 2009 and is, as such, some 312 days late.

[18] The reason for the delay is acceptable and adequate insofar as the parties are **ad idem** that the appellant sought and secured extension of time on numerous occasions covering the full period of the delay. Although the respondent's relevant office did not have the requisite authority to extend the 30 day period prescribed for lodging appeals, it is clear that there was a genuine common mistake of law on the part of the parties in that regard.

(see Tshivhase Royal Council v Tshivhase 1992(4) SA 852 (A) @ 863 A-B on common mistake)

[19] In the light of the foregoing the prospects of success are considered, by the Tribunal, to have passed muster for the purposes of condonation given the strong explanation for the delay. None of the ineptitude or remissness involved in lodging the appeal can be imputed to the appellant.

(see SABC v CCMA & others (2002) 23 ILJ 1549 (LAC) and NUMSA obo Mabunda v Manganese Metal Co. (Pty) Ltd (1995) 16 ILJ 219 (IC) as well as Webster & Anor. v Santam Insurance Co. Ltd 1977 (2) SA 874 (A) @ 883 E – H)

[20] There is, further, no evidence of any prejudice on the part of the respondent in that it had, effectively, consented to condonation insofar as it granted “**extension**” of the relevant period to the appellant. There is, thus, some merit in the appellant's contention to the effect that the respondent is estopped from relying on the correct state of affairs with regard to the law.

(see Barclays Western Bank Ltd v Fourie 1979(4) SA 157 (c) and Trust Bank Van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) @ 415H – 416A on estoppel)

RULING:

[21] In the result condonation is granted.

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[22] The appeal shall, therefore, be rescheduled for a hearing in due course.

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



L.J LEKALE
(Chairperson)