

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 02/04/2007

In the appeal between:-

J.D BARNARD

APPELLANT

and

**DEPARTMENT OF WATER AFFAIRS AND
FORESTRY**

RESPONDENT

APPEAL DECISION

APPEARANCES

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

For the appellant : **Adv. JP Verster** instructed by Hill, Mc Hardy and
Herbst Inc. of Bloemfontein

For the respondent : **Mr. Teffo Mashala** from its Legal Directorate in
Pretoria

DETAILS OF HEARING AND REPRESENTATION:

- [1] This is a majority decision in the appeal hearing held at Pretoria over 2 (two) days viz. the 25th May 2009 and the 7th October 2009.
- [2] The appellant was represented by **Adv. J.P Verster** instructed by Hill, Mc Hardy and Herbst Inc. Attorneys from Bloemfontein while the respondent, on its part, was represented by **Mr. T. Mashala** from its Legal Directorate in Pretoria.

ISSUE TO BE DECIDED:

- [3] The question to be determined was whether or not, on available evidence, there existed the facts necessary to sustain a directive issued by the respondent against the appellant in terms of section 53(1) of the National Water Act (the Act).
- [4] In the event of the foregoing question being decided in the negative, the Water Tribunal was effectively requested to set the directive aside.

BACKGROUND TO THE ISSUE:

- [5] On the 21st August 2006 the respondent issued a notice to the appellant requiring him to apply for verification of water uses in respect of his properties situate in the registration division of Boshof in terms of section 35(1) of the Act.
- [6] The appellant duly obliged on the 24th October 2006.
- [7] On the 27th February 2007, following a number of correspondence exchanged between the parties, the respondent notified the appellant of its intention to issue a directive and duly issued the same on the 6th March 2007.
- [8] The appellant, thereafter, lodged an appeal against the said directive on the 14th March 2007.

- [9] On its part the respondent duly furnished documents and reasons in support of the directive as required by item 5 of Schedule 6 to the Act on the 4th June 2008.
- [10] The matter was eventually heard in earnest on the 25th May 2009 but could not be finalised and was rescheduled and finalised on the 7th October 2009.

SURVEY OF EVIDENCE AND ARGUMENT:

- [11] The parties adduced oral evidence and submitted documents in support of their respective cases as contained in the bundle made available by the Registrar of the Tribunal as well as exhibits admitted into the proceedings.
- [12] Mr. Verster, further, submitted Heads of Argument while Mr. Mashala, on behalf of the respondent, made verbal submissions.
- [13] The appellant and his Bloemfontein attorney testified collectively to the following effect:
- (a) when the appellant bought the property known as Rusplaas in 1973 a canal through which irrigation took place was already in existence;
 - (b) the said canal has been in existence for over 100 years and various farmers drew water from it;
 - (c) following receipt of the notice to apply for verification the appellant enlisted professional help;
 - (d) on the 27th February 2007 when the appellant received the notice of intention to issue a directive he had crops under irrigation which was being done in terms of the right to the canal and not under any legislation;
 - (e) some verifications or water use determinations were made in May and July 2006 in respect of the property known as Zoutpansdrift as per letters dated the 18th May and 13th July 2006;
 - (f) the directive as issued on the 6th March 2007 required the appellant to stop drawing water from the Vaal River for irrigation purposes on the basis that he was using the same unlawfully on, inter alia, Zoutpansdrift;

- (g) on the 9th March 2007 the appellant learnt that the respondent's officials arrived on the farm in a helicopter and a double cab vehicle with many people and stopped irrigation;
- (h) the appellant, thereafter, engaged his attorney, one Schuurman, to handle the matter further;
- (i) Schuurman engaged the officials of the respondent in vain in an attempt to ensure that irrigation continued in order to salvage the crops; and
- (j) Schuurman's efforts aimed at ensuring that the appellant's annual water allocation for the new water circle which commenced on the 1st April 2007 was not interrupted were unsuccessful as the respondent only offered to reinstate the relevant water uses on certain unacceptable conditions.

[14] The respondent's case on the other hand rested on the oral evidence of 2(two) witnesses who collectively testified to, inter alia, the effect that:

[14.1] **HENDRIK LODEWYK DU TOIT:**

- (a) He is currently employed as Deputy Director-Water Regulation and Use for the Northern Cape Regional Control and he was the running or case officer in respect of the directive in question;
- (b) The directive was issued on the basis that the appellant had exceeded his annual allocation of water and it was meant to operate until the end of the relevant water year viz. 31st March 2007;
- (c) The period of operation of the directive has, thus, since lapsed;
- (d) The canal is simply a water work or a conveyor through which the water user accesses water from the Vaal River and is, as such, not a water resource;
- (e) As part of the verification process the appellant was requested to clarify the issue of the certificate authorizing water use from the canal system in terms of, inter alia,

section 9 of Act 54 of 1956 per a letter dated the 6th February 2007;

- (f) The appellant was given fair and ample opportunity to furnish documents proving his entitlement insofar as he submitted various documents regarding the verification process.

[14.2] **JACOB JOHANNES WESSELS:**

- (a) He is a hydrologist who was in the employ of the respondent for 46 years before he bowed out;
- (b) He has on occasion assisted a judge in water cases and was also tasked by the respondent's previous Minister with the drafting of the National Water Act;
- (c) In his view the area under the command of the canal in question is about 18 hectares;
- (d) Around 1956 all farms around the Vaal River were issued with permits and, as such, the relevant water use required authorization in the form of permits from thence forth;
- (e) The water in the furrow in question is the Vaal River water and a furrow is a water work through which water is abstracted from the river;
- (f) Prior to the issuing of permits water users were allowed to abstract their fair share of the water from the river and the 1934 Act quantified such a fair share.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [15] Section 53(1) of the Act empowers a responsible authority in the position of the respondent to issue a directive against a water user who contravenes, inter alia, any provision of the relevant Chapter. The tribunal was, however, divided on whether or not it had the power to enquire into whether or not there was a contravention warranting the issuing of the directive herein in the determination of the appeal. The majority answered that question in the affirmative while the minority, on its part, felt that such an enquiry is legal

in nature and is, as such, reserved for forums that have adjudicative powers as opposed to administrative jurisdiction.

- [16] The contravention of, inter alia, any provision of Chapter 4 of the Act is, in the view of the majority, a fact without which no section 53(1) directive can be issued. In other words the existence of such a fact is a **conditio sine qua non** or cause for the issuing of the relevant directive.
- [17] The heading to the relevant section of the Act suggests that the aim of the directive is to rectify a contravention of any of the provisions of Chapter 4 of the Act, among others, and where there is no contravention no section 53(1) directive can, in law, be issued.
- [18] It was, thus, imperative for the Tribunal to enquire, by way of hearing and receiving evidence, whether or not there was a contravention of the relevant provisions in order to establish the legal basis of the directive in question.
- [19] In the directive the respondent furnished the reason for the same as the fact that it had been found that the appellant was using water unlawfully on the relevant property.
- [20] The appellant is, further, directed in imperative terms to stop the taking of water out of the Vaal River for irrigation purposes and to disconnect all existing electrical equipment being used for such abstraction. Reference is, furthermore, made to section 22 of the Act as the provision which requires authority for water use except for specified situations.
- [21] According to the letters from the respondent's Northern Cape Regional Office dated the 18th May and 13th July 2006 the appellant was entitled to use no more than 45 694 m³ of water per year on one or more of the properties.
- [22] A general statement in the directive to the effect that the appellant was using water unlawfully on the relevant property was, thus, not entirely correct for he was clearly using some of the water lawfully.
- [23] A blanket directive prohibiting the use of water which extends to that part of the water use which is authorised is, in the Tribunal's view, also not in line with the spirit and letter of section 53(1) of the Act.
- [24] The directive, in the Tribunal's considered view, therefore lacked factual justification to the extent to which it covers and affects the appellant's authorised water use. To that extent, it, thus, fell to be set aside as being

without factual basis insofar as the appellant contravened no provision of Chapter 4 of the Act in that regard.

[25] The next enquiry was whether or not the directive could be amended or modified so as to re-direct it towards the actual contravention in order to rectify the same.

[26] In order to answer the foregoing question it was necessary for the Tribunal to identify, through the material properly before it, the relevant contravention of the provisions of Chapter 4 of the Act and the extent of such a contravention.

[27] The evidentiary onus in this regard was, in the Tribunal's view, on the respondent to show the extent of the unauthorized water use insofar as it issued the relevant directive.

[28] There was, however, no sufficiently clear identification of the unauthorized water use before the Tribunal insofar as:

[28.1] a letter dated the 19th December 2006 from the respondent which intimated that the appellant's **"allocated volume of water in a water year is 47 584 m³"** while according **"to [his] agreed crop water use calculations for the water year 2006/2007... an area under irrigation / abstraction [is] 385 000 m³"** leaving 337 416 m³ unlawful was not a final determination of the lawfulness and extent of his water use;

[28.2] the said letter clearly indicated that such a final determination would only be made by the delegated official after the appellant's written representations regarding any aspect of the determination as supported by any documents had been received by the 8th January 2007;

[28.3] the appellant was, in terms of that letter, promised to be informed of the final decision after the matter had been adjudicated upon. A letter dated the 10th October 2006 and signed on the 12th October 2006 from the respondent made a similar undertaking;

[28.4] the appellant was required to give substantial evidence not later than the 23rd February 2007 as per a letter dated the 6th February 2007;

[28.5] a letter dated the 7th March 2007, viz a day after the directive was issued, was also not a final determination in that it was not to that effect and if it was, it came after the fact of the directive and did not precede it;

[29] Although it is, in the Tribunal's view, not always necessary for the respondent to make a verification of a water use before it issues a directive, it was necessary, in the circumstances of the present matter, for a determination to precede the directive in order for the Tribunal to be able to separate the bad from the good so as to amend and modify the directive accordingly. To the foregoing extent it was possible that the directive was issued prematurely.

[30] In the present matter it was not possible to restrict the directive to the unauthorized water use and, as such, the whole directive fell to be set aside as lacking in clarity and particularity as far as factual basis was concerned.

[31] Mr. du Toit's testimony to the effect that the directive was issued because the appellant had exceeded his yearly quota or allocation and that it was restricted to the 2006/2007 water year was, with respect, not supported by the clear wording and import of the directive and was, further, inconsistent with the contents of a letter dated the 5th April 2007 addressed to the appellant by the respondent and bearing his, Mr. du Toit, reference. The said letter, inter alia, intimated that abstraction from the Vaal River could only resume after certain conditions relating to payment of costs, procurement and installation of an electro-magnetic flow meter as well as payment of all water rates had been complied with. If Mr. du Toit's version was correct, one would have expected the directive to have, inter alia, indicated that the appellant had contravened the conditions relating to his authority to use water and not to refer to contravention of section 22 of the Act. Even on the basis of Mr. du Toit's evidence it was clear that the directive did not reflect the correct situation and fell to be interfered with on that ground alone.

[32] Mr. Verster, on his part, accepted Mr. du Toit's ipse dixit with regard to, inter alia, the duration of the directive and effectively requested the Tribunal to make a determination of the appellant's entitlement instead of dealing with the directive.

[33] The Tribunal was, however, not able to accede to his request firstly because the matter properly before it was an appeal against the directive and not an appeal against a decision on the verification of a water use under section 35 of the Act and secondly, because no sufficient evidence or clear decision on verification existed.

[34] In conclusion the Tribunal deemed it necessary to point out the following in the light of Adv. Verster's request:-

[34.1] it may be necessary for the appellant to engage the respondent with a view to reaching finality on the verification process. In this regard it should be noted that, in the Tribunal's opinion, no determination had, as at the date of final hearing of the appeal, been made.


[34.2] if the appellant feels that he is entitled to more allocation of water, he may invoke the relevant process as it is not in the capacity of the Tribunal to assist him in that regard under the present process.

DECISION:

[35] In the result the directive dated the 6th March 2007 is hereby set aside in toto.

[36] The file shall, therefore, be closed.

DATED AT PRETORIA ON THIS *17th*..... DAY OF NOVEMBER 2009.



L.J. LEKALE (Chairman)