

IN THE WATER TRIBUNAL

APPEAL NO: WT 03/13/MP

HELD AT PRETORIA

In the appeal of:

**ESCARPMENT ENVIRONMENT PROTECTION
GROUP**

APPELLANT

AND

**DIRECTOR-GENERAL: DEPARTMENT OF
WATER AND SANITATION**

FIRST RESPONDENT

WILLIAM PATRICK BOWER (PTY) LTD

SECOND RESPONDENT

**INKOMATI USUTHU CATCHMENT
MANAGEMENT AUTHORITY**

THIRD RESPONDENT

RULING ON APPLICATION FOR A POSTPONEMENT

DATE HEARD AND DECIDED:

16 April 2019

APPEARANCES

Coram: Prof. T. Murombo - Additional Member (Chairing).
Ms. L. Mbanjwa - Deputy Chairperson.
Mr. F. Zondagh - Additional Member.

For the Appellants: Mr. Frick van Schalwyk of FVS Attorneys.

For 1st&3rd Respondent: Adv. T. Lupuwana –instructed by the State Attorney,
Pretoria(Mr. CE Snyman Pretoria.)

For 2nd Respondent: Adv. WJ. Vermeulen – instructed by Van der Merwe
BergAttorneys.

INTRODUCTION

[1]. The Appellant is Environment Escarpment Environmental Protection Group (EEPG), a public interest environmental organization whose mission is to promote environmental protection and conservation. The First and Third Respondents are public water management authorities charged with the administration and implementation of the country's national water legislation. The Second Respondent is William Patrick Bower (Pty) Ltd, a private company engaged in the business of mining.

[2]. This is an appeal brought by the Appellant in terms of section 148(1)(f) National Water Act 36 of 1998 ('the NWA') against the decision of the First Respondent, taken on 4 October 2015, to issue a water use licence ('WUL') to the Second Respondent ('WPB') in terms of section 40 of the NWA. The Second Respondent had obtained a mining right on 10 December 2012, and thereafter applied for a WUL on 15 March 2012.

[3]. The Appellant lodged objections to the WUL application on 1 August 2013.¹ There is also on record an objection and appeal lodged by BirdLife, South Africa, although they are not party to this appeal.² At the time of the assessment and evaluation of the WPB WUL application, the Third Respondent was delegated as the responsible authority by the Minister of

¹Record of Appeal p34.

²Record of Appeal p207.

Water and Sanitation. The Director-General of the Department is currently now the delegated responsible authority.

[4]. The application was approved, and WPB was issued with Licence No. 05/X21F/ACGIJ/3663 ('WUL'), by the First Respondent on 4 October 2015 in her delegated capacity as the responsible authority. The WUL was for purposes of enabling WPB to undertake certain water uses in relation to the mining of coal.³ WPB has been operating the mine after the Minister of Water and Sanitation acted in terms of section 148(2)(b) of the NWA, to uplift the suspension of the WUL by the appeal. The WUL is set to expire next year in October 2020. The Environmental Management Programme for the mine was approved by the Regional Manager, Department of Mineral Resources, Mpumalanga on 9 November 2016.

[5]. The Appellant lodged an appeal with this Tribunal initially on 10 December 2015 relying on a letter provided by the Third Respondent to explain the decision to grant the WUL. The official reasons for the decision were however furnished by way of the Record of Recommendation ('ROR') on 8 May 2017, as required by section 148 (3)(c) of the NWA. This

³ The used applied for were in terms of sections 21(a), 21(c), 21(g); 21(i) and 21(j) of the NWA for mining activities in the Magisterial District of Belfast in the Mpumalanga Province, on Portion 6 and 23 of Groenvlei 353 JT, and Portion 12 of Lakenvlei 355 JT. The intended water use were: *the taking of water from a water resource, impeding or diverting the flow of water in a watercourse, disposing of water in a manner which may detrimentally impact on a water resource, altering the bed, banks, course or characteristics of a watercourse, and removing, discharging or disposing of water found underground* if it is necessary for the efficient continuation of an activity or for the safety of members of the public. (see Record of Appeal p348).

was nearly years after the request for the reasons for decision by the Appellants.⁴

[6]. The Appellants supplemented the ground of appeal on 2 June 2017. The amplified appeal makes reference to the ROR as Annexure B,⁵ yet neither the Appellant nor the Respondents attached the ROR to their submissions. Similarly, the Appellants, in the grounds of appeal, make reference to the WUL application (Annexure C) but the specialist reports so referenced not lodged with the Registrar. Therefore, the record is incomplete in that it does not contain information which both the Appellants and the Respondents have had in their possession for over two years.

[7]. Upon being served with the appeal papers, the Second Respondent ('WPB') prepared and filed opposing papers on 12 July 2017.⁶ The appeal was set down initially in November 2017, but that hearing did not proceed, and the set down notice was not served on all parties. Then it was set down for 16 to 17 April 2019, the current hearing.

[8]. Despite being served with the original and amplified appeals on time, the First and Third Respondents never filed any opposing or responding papers until the 15th of April 2019 a day before this hearing. On 12 April 2019 the

⁴Record of Appeal p203 (Letter from Appellants requesting reasons dated 13 November 2015.)

⁵Record of Appeal p76.

⁶Appeal Record p131-136.

State Attorney on behalf of the First and Third Respondents wrote a letter to the Registrar indicating that they will be seeking a postponement for the following reasons:

- [8.1]. That the first and second respondents are of the opinion that the matter will not be ripe to proceed on the dates as set down.
 - [8.2]. The first respondent intends to file a statement setting out the grounds of opposition to the appellant's grounds of appeal.
 - [8.3.] That the first respondent's counsel, who was initially briefed to attend to this appeal, recently indicated that she will not be available to attend to this matter.
 - [8.4.] That first respondent had to attend to the appointment of a new counsel who had to be brought into the picture in the above application and had to assist with drafting the grounds of opposition that is to be filed shortly.
 - [8.5.] First and third respondents do not believe that the documentation as contained in the appellant's bundle, reflects all the documents that need to serve before the Tribunal.
 - [8.6.] That it could not be confirmed that the record of decision of the third respondent has been included as part of the bundle of documents before the Tribunal.
 - [8.7.] That the dates reserved for the hearing of this matter be retained, and utilized, at least in part, for a pre-trial conference between the parties in order to attempt to narrow down the issues that are to serve before the tribunal in order to shorten the proceedings before the Tribunal and to deal with all other issues as required by Rule 37.⁷
- [9]. At no point prior to the date of this letter did the First and Third

⁷I note that the Rules of the Water Tribunal (2005) do not have a Rule 37. This was a reference to the High Court Rules.

Respondents reach out to the Appellants with a proposal for the so-called pre-trial conference to narrow down the issues or to discuss the appeal. It was only when confronted with the inevitable prospect of a hearing where they had not filed any papers for three years, that they suddenly realised the need to engage the other parties.

[10]. It was also only in April 2019 that the First and Third Respondents realised that they had to file opposing papers. In para 7.6 above, both parties are unsure if the ROR (a document which they generated and used to make the decision on the WUL application) is part of the appeal record.

The Law

[11]. Section 148 of the NWA provides for the jurisdiction of the Water Tribunal and the grounds on which an appeal may be noted to the Tribunal. Section 148(5)(a) of the NWA mandates the Chairperson of the Water Tribunal to make rules amplifying the procedures of the Tribunal. Such rules were promulgated in 2005.

[12]. In terms of Rule 6 of the Tribunal Rules (*Deferment of sittings or postponement*),

- (1) The Chairperson of the Tribunal may be requested in writing for a deferment of a sitting or a postponement of hearing and such a request must include the reasons and reach the Chairperson at least ten (10) days before the scheduled date of the sitting in issue or hearing.

- (2) The Chairperson of the Tribunal or a member thereof nominated by the Chairperson may grant a deferment of a sitting or postponement of a hearing *if satisfied* that there is a good cause for a requested deferment or postponement.
- (3) If a deferment or postponement has been granted, the officer must give notice of such deferment or postponement to all the affected parties, within three (3) days after the Tribunal's decision to grant a deferment or postponement."⁸

SUBMISSIONS BY THE PARTIES AND FINDINGS

[13]. The First Respondent in their submissions stated that their officer who was dealing with the appeal had resigned on 31 March 2018. Likewise, the counsel who the First Respondent had briefed on the matter had also become unavailable to deal with the matter since March 2018. It was averred that the appointment of a replacement counsel took a long time. The new counsel had two weeks in April 2019 to familiarise with the appeal documents and draft opposing statement.

[14]. The process to appoint counsel and to draft opposing papers was only finalised on 15 April 2019. Therefore, the First and Third Respondents needed time to fully prepare for the hearing.

[15]. Despite not making the request for postponement ten (10) days

⁸Emphasis added.

before the set down date, the First and Second Respondents only applied for condonation of that oversight at the hearing after we read out the provisions of Rule 6 to the parties.

[16]. Upon being questioned counsel indicated that the official of the First Respondent who was dealing with the matter (supervisor) was present but had no explanation as to why the First and Third Respondents did not file any responding papers until 15 April 2019. Apparently, the supervisor laboured under the mistaken assumption that such opposing papers had long been filed. On being asked what steps were taken by First Respondent since 31 March 2018 to ensure that matter was assigned to another officer, no explanation was forthcoming.

[17]. Furthermore, when asked why there was a scramble around to brief counsel in April 2019 when the previous counsel became unavailable in March 2018, again the First Respondent had no explanation apart from stating that the process to appoint counsel takes time. Furthermore, when asked why there was a scramble to brief counsel in April 2019 when the previous counsel became unavailable since 2018, again the First Respondent had no explanation apart from stating that the administrative process to appoint counsel takes time.

[18]. The First and Third Respondents also submitted that the grounds of

appeal raise several technical points that require expert witnesses and also a pre-hearing conference convened to narrow down the issues.

[19]. On their part, the Appellant indicated that it was also not ready to proceed with the appeal hearing because the counsel briefed to argue the matter had a family emergency on hearing date. The Appellant's attorney himself was the third attorney retained to handle the appeal and had only been seized of the matter a few weeks prior. He needed time to familiarise himself with the papers and to properly brief counsel. Consultations with the Appellant's members, who are scattered across the country, is a challenging exercise, but he needs such consultation to fully get instructions and fully brief counsel.

[20]. Counsel for the Second Respondent indicated that they were always ready to argue the appeal. They indicated in response that the Second Respondent was not and would not suffer any prejudice if the matter is postponed given that the Second Respondent has continued with its mining activities. Be that as it may, counsel for Second Respondent responded that he did not find the basis of the application for postponement by First and Third Respondent to be reasonable. The reasons advanced for the unavailability of Appellant's counsel were understandable.

[21]. We applied our minds to the written and oral submissions by the

parties and made the following findings:

[22]. We noted that this appeal has been pending for some years, in the meanwhile, the Second Respondent continues with its mining activities. A number of the issues raised in the grounds of appeal will become academic by the time the appeal is heard on the merits. Even the hearing itself, on the amplified grounds of appeal, may at best be academic or moot, and at worst a *brutum fulmen*. This hopeless prospect can be remedied if the grounds of appeal can be reviewed in the context of the current state of the environment and water resources at the mining site.

[23]. The lethargic approach by the First and Third Respondent as trustees of the water resources (section 3 of the NWA) and duty bearers in terms of section 2 of the NWA read together with section 2(4) of the National Environmental Management Act (107 of 1998) and section 24 of the Constitution is disappointing. We therefore, find that in terms of Rule 6(2) of the Rules, the First and Third Respondents have no good cause to seek a postponement. The reasons submitted in support of their application have not satisfied us of the existence of any good cause why they have failed to respond to the appeal with the expected tenacity. These failings eventually result in degradation and impacts on the water resources.

[24]. We accepted the reasons why the counsel for Appellant was

unavailable and are satisfied that the Appellant would have a good cause to seek a postponement of the appeal.

[25]. We have conceded that the parties can have a pre-hearing conference and provide the Tribunal with the pre-hearing minute.

[26]. We also rule that the parties must gather their experts and include them at the pre-hearing conference and prepare a joint minute of experts. Such joint minute by the experts must reflect what is the current state of the water resources on site, not based merely on the technical reports submitted in 2015. These, by now, have been overtaken by events especially the on-going mining activities. The minutes of the pre-hearing conference should be informed by current, latest monitoring reports compiled by the Second Respondent in accordance with the WUL conditions.

ORDER

[27]. The appeal is postponed *sine die*.

[28]. By consent the parties are to convene a pre-hearing conference amongst themselves by Friday, the 31st of May 2019 where they will discuss the grounds of appeal and narrow down the issues.

[29]. The parties consented, and it is hereby ordered that concurrent with the pre-hearing conference, the parties are to discuss and share each other's expert witnesses' outlines of evidence and ensure that the

experts prepare a joint minuting of what is common cause and what is in issue.

[30]. The experts joint minute and the minute from the pre-hearing conference are to be based on updated information based on the monitoring reports produced by the Second Respondent in terms of the conditions of the WUL.

[30.1]. In particular the final rehabilitation plan required in terms of Appendix I, Clause 10-12; the reports required in terms of Appendix III Clause 3.1.2 and Clause 4.5 read with Clause 4.7; Clause 5.2 of Licence number 05/X21F/ACGIJ/3663 (File No:27/2/2X21F/093).

[31]. The reports are to be submitted to the Registrar of the Tribunal by the 31st of May 2019.

[32]. The Appellant is to ensure that the record is complete and properly paginated before any future set downs.

HANDED DOWN AT PRETORIA ON 16TH DAY OF APRIL 2019.



Prof. Tumai Murombo
Additional Member (Panel Chair)

Mr. F. Zondagh
Additional Member
I agree, and it is so ordered.

Ms.L.Mbanjwa
Deputy Chairperson of the Tribunal
I agree, and it is so ordered.

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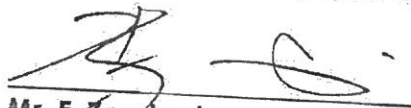
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Prof. Tumai Murombo
Additional Member (Panel Chair)



Mr. F. Zondagh
Additional Member
I agree, and it is so ordered.



Ms. L. Mbanjwa
Deputy Chairperson of the Tribunal
I agree, and it is so ordered.

