

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 25/05/2006

In the appeal between:-

**BAREND JACOBUS AND ANNA CATHERINA
FOURIE NO**

APPELLANT

and

**DEPARTMENT OF WATER AFFAIRS AND
FORESTRY**

RESPONDENT

APPEAL DECISION

APPEARANCES

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

For the appellant : **Adv. LI Vorster SC** instructed by Barnard &
Venter Inc.- Attorneys
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For the respondent : **Mr. A Seletisha** from its Legal Directorate in
Pretoria

DETAILS OF HEARING AND REPRESENTATION:

- [1] This is a unanimous decision in the appeal hearing held at Pretoria on the 6th October 2009.
- [2] The appellants were represented by **Adv. LI Vorster SC** instructed by Mr. M Venter of Barnard & Venter Inc of Clocolan.
- [3] The respondent, on its part, was represented by **Mr. Andrew Seletisha** from its Legal Directorate in Pretoria.

ISSUE TO BE DECIDED:

- [4] The preliminary question raised by the Water Tribunal of own accord was whether or not the Tribunal, in terms of its appeal jurisdiction, had the power to declare as invalid or unlawful the contents of an Internal Strategic Perspective (ISP) an official document of the respondent which, inter alia, allows the respondent to earmark certain quantity of water for use by resource poor farmers for irrigation, among others.
- [5] In the event of the foregoing question being decided in the affirmative, the next enquiry was whether or not the said ISP was lawful insofar as the Minister had, in terms thereof, earmarked the use of certain volume of water for resource poor farmers.
- [6] In the further event of the question in paragraph [5] above being decided in the negative, the Tribunal was requested to set aside the decision refusing water use licences to the appellants and to grant the necessary licences subject to such periods of review as may meet the circumstances of the case.

BACKGROUND TO THE ISSUE:

- [7] The 2(two) appellants applied unsuccessfully for licences to take and store water with a collective decision refusing the applications being made on the 28th April 2006.

- [8] The appellants thereafter lodged a joint appeal against the decision on the 25th May 2006.
- [9] The matter was, eventually, scheduled for a hearing on the 6th October 2009. After hearing the parties' opening statements and / or submissions the Tribunal was left in doubt as to whether or not it had jurisdiction to enquire into the lawfulness of the relevant ISP and, as such, *mero motu* required the parties to address it on the issue *ante omnia* as a point *in limine*.
- [10] The foregoing occurred after it became clear from the appellants' submissions and Heads of Argument that the gravamen of the appeal was that the Minister exceeded the powers conferred on the relevant office by earmarking water for future use or allocation to resource poor farmers for, inter alia, irrigation purposes.

SURVEY OF EVIDENCE AND ARGUMENT:

- [11] No oral evidence was adduced. The parties made oral submissions and Adv. Vorster, further, handed in Heads of Argument on behalf of the appellants.
- [12] The appellants effectively contended that the Minister was, in law, not entitled to make reservation of water by way of an ISP and is only entitled to determine the quantity of water in respect of which water use licences may be issued in terms of section 23 of the Act. In Mr. Vorster's view, once such a determination was done, the water was destined by the relevant responsible authority for allocation to deserving applicants regard being had only to the considerations listed in section 27 of the Act as the only relevant factors in the determination of applications for water use licences. Section 29 of the Act, the argument continued, relates to the specific conditions which may be imposed when a licence is issued and does not authorize the responsible authority to refuse a licence on the basis that available water is reserved for future uses where there are no competing applications from those for whose use the water is reserved. In his view, if there arises, in the future, the need to accommodate demands brought about by changes in the socio-economic circumstances or public interest, such a demand should be dealt with under section 49(2)(c) of the Act.

[13] Mr. Vorster, further, contended that the respondent, as the responsible authority, was for the reason of the unlawfulness of the said reservations not supposed to have followed the ISP. He, furthermore, insisted that the Tribunal had the requisite jurisdiction to question the ISP and to disregard it when it heard the matter afresh in terms of its appeal jurisdiction.

[14] On behalf of the respondent Mr. Seletisha pointed out that the Tribunal, as a creature of statute, only had the authority to exercise the power conferred on it by its enabling Act. He, further, contended that the Water Tribunal does not have jurisdiction to enquire into the lawfulness of the ISP. In his view, the Tribunal's power was limited to establishing the existence of the ISP as well as enquiring after whether or not the respondent, in refusing the applications, acted in accordance therewith.

[15] In Mr. Seletisha's view the list of factors set out in section 27 of the Act is not exhaustive and the appellants had failed to show any cause why the relevant licences should be issued to them.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[16] In terms of section 148(1)(f) of the Act an appeal lies to the Tribunal against the decision of the responsible authority, in the position of the respondent, on an application for a water use licence.

[17] No appeal lies to the Tribunal against a decision of the respondent or the Minister related to an ISP or any catchment management strategies.

[18] The respondent suggested, in the letter conveying its decision to the appellants, that the relevant ISP is a catchment management strategy insofar as it attributed the decision to the ISP by pointing out that "**in terms of the Internal Strategic Perspective (Catchment Management Strategy)...**"

[19] The foregoing was not specifically disputed by the appellants during the appeal hearing or in their appeal documents with Adv. Vorster not devoting any specific argument to the nature of the document in question.

[20] The establishment of catchment management strategies takes place in terms of section 8 of the Act. Section 11 of the Act, on its part, requires the Minister and the relevant catchment management agency to give effect to any established catchment management strategy when exercising any power or performing any duty in terms of the Act.

- [21] If it is correct, as suggested by the respondent, that the relevant ISP is a catchment management strategy, then and only in that eventuality, it was axiomatic that the respondent was obliged to give effect to and to comply with the provisions of the ISP.
- [22] The Tribunal was, however, of the view that it was not necessary, for the purposes of the present matter, to establish the real nature of the relevant ISP insofar as it derives its appeal powers from section 148 of the Act. The Tribunal still had no power to determine the validity or lawfulness of the ISP in terms of its appeal jurisdiction whether or not such a document was a catchment management strategy.
- [23] The existence of the relevant ISP as a document through which some water use has been earmarked for resource poor farmers was not in dispute. Section 27 of the Act, as correctly contended for the respondent, does not preclude the respondent from considering other factors over and above the considerations set out therein. The fact that the Minister has earmarked certain quantity of water for resource poor farmer was, in the Tribunal's view, relevant to the matter and could be considered by the respondent in the determination of the applications in question.
- [24] In the exercise of its jurisdiction the Tribunal has to consider all the factors which the respondent was entitled to take into account when considering an application insofar as it has to determine the matter afresh by way of a re-hearing. In doing the foregoing the Tribunal looks at the relevant ISP in much the same way as the respondent was entitled to take it into account as its official document.
- [25] Where the appellant feels aggrieved by the contents of a departmental document such as an ISP the appropriate avenue, in the Tribunal's view, is to approach a court of competent jurisdiction for appropriate relief.
- [26] The appellants did not, as effectively submitted by Mr. Seletisha, show cause for deviation from the relevant ISP in order to justify the issuing of the relevant licences to them.

DECISION:

- [25] In the result the appeal fails and the decision of the respondent is confirmed.
- [26] The file shall, therefore, be closed.

DATED AT PRETORIA ON THIS 16TH DAY OF NOVEMBER 2009.



L.J LEKALE (Chairman)