

IN THE WATER TRIBUNAL

HELD AT PRETORIA

In the application between:-

CASE NO: WT-23/02/09

JOHANNA SWEETNAM

APPLICANT

and

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

APPEAL DECISION

APPEARANCES

Coram

Mr. L.J Lekale (Chairperson)

Dr. W Singo (Deputy Chairperson)

Mr. H Thompson (Member)

Mr. A.S Makhanya (Member)

FOR THE APPLICANT

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FOR THE RESPONDENT

Mr. Andrew Seletisha from Respondent's Legal
Services Directorate – Pretoria.

1. **DETAILS OF HEARING AND REPRESENTATION:**

- 1.1. The appeal hearing was held at Pretoria on the 19th June 2009;
- 1.2. The appellant was represented by Adv. Corole Cooper duly instructed by C.N Sweetnam Attorneys of Johannesburg while the respondent, on its part, was represented by **Mr. Andrew Seletisha** from its Legal Services Directorate in Pretoria.

2. **ISSUE TO BE DECIDED:**

- 2.1. The question to be determined was whether or not the appellant was entitled to a water use licence in respect of a transfer made in her favour in order to facilitate her application for such a license with specific reference to the following questions:
 - 2.1.1. whether or not the respondent took into account all the relevant factors including those set out in section 27(1)(a) to (k) of the National Water Act (NWA) when considering the appellant's application; and
 - 2.1.2. whether or not the granting of the relevant licence would satisfy the transformation factor as contemplated by section 27 (1)(b) of NWA;
- 2.2. In the event of the foregoing question being decided in the affirmative, the Tribunal was implored to declare the appellant to be entitled to the relevant water use licence.

3. **BACKGROUND TO THE ISSUE:**

The appellant applied unsuccessfully for permanent transfer of water use rights in her favour on the 28th September 2005 with a decision refusing the application being made on the 11th April 2008 by the respondent as the responsible authority.

The appellant lodged an appeal against the said decision on the 22nd July 2008 and applied successfully for condonation of the late lodging of the said appeal with the condonation ruling being issued on the 6th January 2009.

At the appeal hearing the appellant effectively and correctly abandoned her reliance on the provisions of the **Promotion of Administrative Justice Act (PAJA)** and limited her grounds of appeal to the questions set out in paragraph 2 above. In the Tribunal's humble view any argument relating to PAJA properly belonged in the High Court or a Tribunal established in terms of PAJA.

This is, therefore, unanimous decision in the appeal.

4. **SURVEY OF EVIDENCE AND ARGUMENT:**

No oral evidence was adduced. The parties made oral submissions and relied on the documents forming part of the bundle prepared by the Registrar of the Water Tribunal.

4.1. **The appellant's submissions:**

Adv. Cooper submitted to, inter alia, the following effect:

- (a) the respondent was obliged to consider all the factors set out in section 27(1) of NWA;
- (b) the respondent failed to consider all the relevant factors and refused the application after taking into account only the transformation factor insofar as no mention of and reference to other factors set out in the relevant section is made in the letter communicating the decision;
- (c) transformation may be attained through a number of ways as was found by the Constitutional Court in **Bato Star (Pty) Ltd v Minister of Environmental Affairs and others 2004(4) SA 490 (CC)**;
- (d) the respondent applied section 27(1) of NWA narrowly and concentrated on ownership and control of the farm when it dealt with the transformation factor;
- (e) the respondent, thus, failed to strike the necessary equilibrium between the relevant factors inclusive of the constitution of the workforce employed by the appellant which happens to be full time and seasonal black employees;
- (f) the fact that the appellant provides employment to members of previously disadvantaged communities satisfies the transformation factor.

4.2. **The respondent's submissions:**

Mr. Seletisha submitted to the following effect, among others:-

- (a) the matter before the Tribunal was not an application for judicial review of an administrative act in terms of PAJA but an appeal in terms of NWA;
- (b) there existed no evidence before the Tribunal to the effect that the relevant factors set out in section 27(1) of NWA were not considered;
- (c) a conclusion to the effect that relevant factors were not taken into account was based on assumptions and not facts;
- (d) there existed no information before the Tribunal to sustain the appeal.

5. **ANALYSIS OF EVIDENCE AND ARGUMENT:**

The onus was generally on the appellant, as the applicant for a water use licence, to prove that she was, in law, entitled to such a licence.

The appeal hearing before the Tribunal was a rehearing of the licence application and, as such, the appellant was generally entitled to submit all the relevant evidence to discharge the burden resting on her (see item 6(3) of schedule 6 to NWA).

The fact that the proceedings before the Tribunal took the form of a rehearing of the licence application effectively meant that the Tribunal was, in law, as obliged to take the factors set out in section 27(1) of NWA into account as the respondent was when it considered the application.

In the light of the foregoing it was, in the Tribunal's humble view, neither necessary nor appropriate in law and / or practice for the Tribunal to enquire into whether or not the respondent took all the factors set out in section 27(1) of NWA into account when it decided on the application. Such an exercise on the part of the Tribunal would, with respect, be legally futile and of no practical consequence because, whatever the outcome, the Tribunal would still be obliged to take the said factors into account when it determines the appeal.

The Tribunal accepted, for the purposes of the appeal, that the respondent was satisfied that the application met the relevant factors prescribed by section 27(1) of NWA save for the transformation factor viz. section 27(1)(b) of NWA.

The foregoing prevailed because, at the hearing, the respondent advanced no reasons in opposition of the appeal other than the transformation factor as set out in its letter of decision.

The real dispute between the parties was, thus, limited to the question whether or not the need to redress the results of past racial and gender discrimination was in favour of the granting of the licence in question.

The appellant, effectively, contended that her application satisfies the transformation factor insofar as she employs people from previously disadvantaged communities on the farm. On its part, the respondent, in effect, did not dispute that the appellant employs such people but contended that the said fact did not constitute proof of satisfaction of the transformation factor.

Adv. Cooper for the appellant correctly and effectively conceded that:

- * even in the days of the past repressive regime black males and females were employed on the farms as general farm labourers, among others;
- * there exists **AGRIBEE Sector Charter** which is applicable to the appellant's farm;

- * the said charter is a transformation charter developed for the agricultural sector in terms of section 12 of **Broad-Based Black Economic Empowerment Act of 2003**;
- * the agricultural sector is under transformation and the transformation factor was, thus, relevant to the application herein.


When all was said and done the Tribunal was satisfied that:

- * the AGRIBEE Sector Charter serves as a yardstick for determining compliance with or satisfaction of the transformation factor;
- * as correctly submitted by **Mr. Seletisha** for the respondent, there existed no evidence before the Tribunal to prove that the appellant meets the seven elements of broad-based BEE set out in the charter. Nor was there any evidence presented to show that the appellant is an Exempted Micro Enterprise (EME) in terms of the charter. In this regard it should be noted that the only relevant piece of information was a submission by **Adv. Cooper** to the effect that the appellant employs numerous full time and seasonal black employees who stood to lose their employment if the transfer of the water use entitlement were to be declined;
- * no evidence was tendered to show in what positions the said members of previously disadvantaged communities are employed.

6. DECISION:

- 6.1. In the result the appeal fails;
- 6.2. The file shall, therefore, be closed.

DATED AT WELKOM ON THIS 9th DAY OF JULY 2009.



L.J. LEKALE
(Chairperson)