

IN THE WATER TRIBUNAL

HELD AT PRETORIA

In the application between:

JOHANNA SWEETNAM

APPLICANT

and

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

CONDONATION RULING : DATE 06-01-2009

Coram : Mr. L.J LEKALE (Chairperson)
Dr. W Singo (Deputy Chairperson)
Mr. A.S Hadebe (Member)
Mr. A.S Makhanya (Member)

For the Appellant : Adv. Carole Cooper
c/o C.N Sweetnam Attorneys
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For the Respondent : No appearance

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

- 1.1. This is a unanimous ruling in the application for condonation of late noting of an appeal heard on the 19th December 2008 at Pretoria;
- 1.2. The applicant was represented by **Adv. Carole Cooper** duly instructed by **C.N Sweetnam, Attorneys**, while there was no appearance for the respondent party;
- 1.3. The hearing proceeded in the absence of the respondent in terms of Rule 9 of the Water Tribunal rules as it was clear that the respondent had been duly notified of the date, time and venue of the hearing.

2. **ISSUE TO BE DECIDED:**

- 2.1. The question to be determined was whether or not good reason existed for condonation of the late noting of an appeal within the contemplation of item 5 (2) of Schedule 6 of the National Water Act (the Act) read with Rule 4(4) of the Water Tribunal rules;
- 2.2. In the event of the foregoing question being decided in the affirmative, the Tribunal was required to condone the late noting of the appeal so as to enable the Registrar to accept the appeal and to schedule it for a hearing in due course.

3. **BACKGROUND TO THE ISSUE:**

The applicant effectively applied for the permanent transfer of water rights in her favour on the 28th September 2005 when the application was submitted to the respondent by the **Mogol River Irrigation Board**.

After some correspondence between the Respondent and the Applicant the former, eventually, decided against the application on the 11th April 2008.

The Respondent's decision was, however, only received by the applicant on the 9th June 2008.

On the 22nd July 2008 the Applicant noted an appeal against the said decision and, further, applied for condonation of the late noting of the appeal.

The condonation application was, eventually, scheduled for a hearing on the 19th December 2008 and the parties were properly notified of the date, time and venue of the hearing as required by Rule 5 of the Water Tribunal rules.

The Respondent was, however, in default and, further, did not deliver any papers in opposition of the application.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced. The applicant submitted a statement of facts and / or law in support of the application to, **inter alia**, the following effect:

- (a) the delay was attributable to the fact that:
- the outcome was only received on the 9th June 2008;
 - the applicant, who is an elderly lady of 75 years of age and who has no legal knowledge, approached the lawyer on or about the 24th June 2008 for assistance;
 - the applicant was not aware of the time frames involved in filing an appeal and once she had contacted a lawyer the latter approached counsel on the 1st July 2008;
 - the counsel involved was, however, not able to start working on the matter immediately due to other legal commitments;
 - counsel had to wait for documents from the **Mogol River Irrigation Board** as well as from the applicant who lives in Pietersburg;
 - on the 4th July 2008, when the attorney and counsel became aware that time was fast running out, a letter was sent to the Respondent requesting an extension for the noting of an appeal;
- (b) the applicant has good prospects of success in the appeal insofar as her case is supported by the decision of the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of the Environmental Affairs & others 2004 (4) SA 490 (CC)**;
- (c) the balance of convenience favours the granting of the application insofar as the respondent would suffer no prejudice while the applicant, on the other hand, will suffer severe prejudice if condonation is refused.

4.2. Argument:

Adv. Cooper submitted to the following effect, among others, in argument:

- (a) the instructing attorney does not have the necessary expertise and when he realised that the National Water Act was complicated he decided to brief counsel;
- (b) the instructing attorney is the applicant's son;

(c) none of the remissness involved, if any, is attributable to the applicant,

(d) the applicant has shown good reason or cause for condonation.

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

The onus was on the applicant to prove, on a balance of probabilities, that good reason existed for condonation (*see Rule 4 of Water Tribunal rules*).

Although the Tribunal was of the view that good reason was distinguishable from good cause, Adv. Cooper effectively contended that good reason was to the same effect as good cause.

The application was, thus, premised on good cause as understood in law with the factors set out in **Melane v Santam Insurance Co. Ltd 1962(4) SAS 31 (A)** being addressed.

In the Tribunal's view it was not necessary, for the determination of this application, to decide whether or not good reason was the same as good cause insofar as the application was not opposed and it dealt at length with, inter alia, the reason for the delay.

When all was said and done, the Tribunal was satisfied, on available material, that:

(a) **Ad degree of lateness:**

The application was some 13 (thirteen) days late insofar as the decision was received on the 9th June 2008 and the 30 (thirty) day period limited for noting an appeal expired on the 9th July 2008.

The period of delay was, in the circumstances of the matter, considerable although not inordinate.

(b) **Ad reason for the delay:**

The reason furnished for the delay was, however, insufficient although it was largely acceptable insofar as:

- no explanation was given for the delay involved between the 24th June 2008 when the attorney received instructions and the 1st July 2008 as well as between the 4th July 2008 and the 22nd July 2008;
- no explanation was given for the apparent delay on the part of the Mogol River Irrigation Board and the applicant in furnishing the required documents to counsel;
- no explanation was given as to why counsel accepted the brief when she was not able to start working on the process immediately due to other legal commitments;

It was clear, however, that none of the ineptitude or remissness was to be imputed to the applicant (see **Webster & Ano. v Santam Insurance Co. Ltd 1977 (2) SA 874 (A)**).

Although the delay was clearly due to the tardiness of the legal representative(s) which does not per se constitute good cause for condonation, the Tribunal was of the view that the refusal of the application on this ground alone would lead to failure of justice (see generally **Swanepoel v Albertyn (2000) 21 ILJ 2701 (LC)**).

(c) **Ad prospects of success:**

The test for prospects of success is a *bona fide* case which *prima facie* carries some prospect of success (see **Chetty v Law Society (TVL) 1985(2) SA 756 (A) @ 765B-D**).

The Tribunal only had the applicant's uncontroverted version on the merits of the appeal. The averments made in the application would, if proved at the appeal hearing, be sufficient to sustain the appeal (see **Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (A) @ 476**).

In the present matter it was apparent from the papers that there was at least a *prima facie* case with some prospect of success in view of the fact that the respondent appeared not to have adopted an objective **conspectus** of all the relevant factors set out in section 27 of the Act.

(d) **Ad prejudice to the respondent:**

No prejudice to the respondent was apparent from the material properly before the Tribunal in so far as the respondent did not deliver any opposing papers.

6. **RULING:**

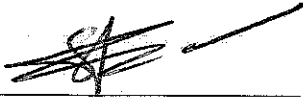
- 6.1. In the result condonation is granted;
- 6.2. The Registrar of the Water Tribunal shall, therefore, accept the appeal and deal with the same in terms of the provisions of the Act and the Water Tribunal rules in due course.


L.J. LEKALE
Chairperson

We agree.



DR. W. SINGO



A.S HADEBE



A.S MAKHANYA