

IN THE WATER TRIBUNAL

HELD AT PRETORIA

REF: WT 28/02/2006

In the appeal between:

KOBUS CROUSE TRUST

APPELLANT

AND

DEPARTMENT OF WATER AFFAIRS AND FORESTRY

RESPONDENT

APPEAL DECISION

DATE: 28 NOVEMBER 2008

APPEARANCES:

Coram : Mr. L.J Lekale (Chairperson)
Dr. W Singo (Deputy Chairperson)
Mr. Hubert Thompson (Member)
Mr. A.S Hadebe (Member)

Appellant : None

First Respondent : Mr. L. Mtshotshisa

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

- 1.1. This is a unanimous decision in the appeal hearing which was held at Pretoria on the 24th November 2008;
- 1.2. There was, effectively, no appearance for the appellant after its representative, **Mr. Tasmond Ayre**, withdrew from the proceedings following an unsuccessful application for a postponement;
- 1.3. The respondent, on its part, was represented by **Mr. Luyanda Mtshotshisa**, from its legal directorate.

2. **ISSUE TO BE DECIDED:**

- 2.1. The question to be determined was whether or not there was a factual and / or legal basis for the directive issued by the respondent's Free State Regional Office against the appellant in terms of section 53(1) of the **National Water Act** (the Act);
- 2.2. In the event of the foregoing question being decided in the negative, the Tribunal was effectively required to set the directive aside.

3. **BACKGROUND TO THE ISSUE:**

On the 27th February 2006 the appellant directed a letter to the respondent's Free State Regional Office in response to a directive issued in terms of section 53(1) of the Act pointing out, inter alia, that it intended to appeal against the same to the Tribunal.

On the 28th February 2006 the appellant duly lodged an appeal. After some struggle in furnishing the reasons for the directive as required by schedule 6 item 5(3) of the Act, the respondent, eventually, provided the Tribunal with the reasons and documents relating to the directive on the 14th August 2006.

On the 17th October 2007 the Registrar of the Tribunal directed a letter to the appellant's representative in which she opined that the matter was ready for a hearing and afforded the appellant an opportunity to submit any further documents, if it so wished.

On the 7th July 2008 the appellant, eventually, responded to the said letter from the Registrar of the Tribunal following a reminder and indicated that there was no further documentation to be submitted.

The matter was, subsequently, scheduled for a hearing on the 10th October 2008 but the hearing was postponed in terms of Rule 6 of the rules of the Water Tribunal.

The hearing was, later, set down for the 24th November 2008 and the parties were duly notified as required by Rule 5(2) of the rules of the Tribunal.

On the 21st November 2008 the appellant filed a notice of application in terms of which it announced its intention to apply for a postponement on the 24th November 2008.

At the commencement of the proceedings on the 24th November 2008 the appellant's representative duly moved for a postponement on, inter alia, the basis that his correspondents at Frankfort were not ready to proceed because they had only taken over from the previous representative and, further, that they had identified the need for a land surveyor's report which was still outstanding.

Although the application was not opposed by the respondent who, in fact, had consented to the postponement, the application was dismissed because the Tribunal was not satisfied that good cause had been shown for a postponement insofar as, in the Tribunal's considered view, the appellant was, inter alia, effectively asking for an opportunity to investigate the lawfulness of the directive where after it would decide on how to proceed further with the appeal.

The appellant's representative, thereafter, withdrew from the proceedings after indicating that his instructions were to take the ruling refusing the postponement on review and, further, to appeal against any decision of the Tribunal should the appeal hearing proceed.

The respondent's representative, on the other hand, conceded that the appeal was lodged timeously although the date of the directive was not apparent *ex facie* the letter from the respondent's Free State Regional Office to the appellant.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced and the Tribunal only had the documents filed of record before it. Mr. Mtshotshisa, further, made oral submissions.

- Documents submitted:

- (a) The appellant's appeal documents including a letter dated the 27th February 2006 addressed to the respondent as well as some aerial photographs;
- (b) The respondent's letter dated the 14th August 2006 outlining reasons for the directive and enclosing written complaints from the appellant's neighbours and / or affected farmers in the relevant area.

4.2. Argument:

Mr. Mtshotshisa submitted to, inter alia, the following effect:

- (a) the respondent stood by its decision and believes that the directive was based on sound factual and legal position insofar as the appellant has no authorization for the water use in question;
- (b) the documents furnished were sufficient to sustain the directive.

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

The appeal before the Tribunal was a hearing *de novo* in terms of item 6 (3) of schedule 6 of the Act.

The Appellant effectively invoked the provisions of Rule 9(1)(a) of the rules of the Water Tribunal insofar as its representative left the proceedings with full knowledge that the appeal was being heard and pointed out that his instructions were to take any appeal decision on appeal to the High Court.

The hearing, thus, proceeded in the absence of the appellant in terms of the Rule 9(1) of the rules of the Tribunal.

The appeal was, effectively, determined on the basis of the documents properly before the Tribunal insofar as no oral evidence was adduced.

It was, inter alia, clear from the respondent's documents that:

- a site inspection was conducted following complaints from the affected farmers in the relevant area as well as the chairman of the Parliamentary Portfolio Committee on Water and Correction;
- two(2) illegal dams were discovered during the said investigation;
- the dams impede the water flow;
- downstream property owners were being deprived of water until and unless the dams in question were filled to capacity;
- the investigation, further, revealed that upstream dams were full whereas downstream pools were dry.

The above findings and observations were not disputed by the appellant although it had ample opportunity to do so with the Registrar of the Tribunal reminding it to file additional documents or information since 2007.

On its part the appellant, in its appeal documents, effectively admitted to building a dam and, at least, storing water therein. The appellant also mentioned that the existing dams were drained and provided the capacities of these dams and the new dam. The intention of this was probably to provide information that the Trust has an existing lawful water use as contemplated in section 32 of the Act. The appellant, therefore, did not aver that it had any authorization for erecting the dam in question or for the water uses involved

There was, thus, nothing before the Tribunal to suggest that the appellant had any legal basis for the water use in question.

The most plausible inference to be drawn from the proved and / or undisputed facts before the Tribunal was that:

- the appellant did not and still does not have the requisite authorisation;
- the directive was grounded on valid facts; and
- the directive was based on sound legal footing insofar as the onus was on the appellant to prove that it had authorization for the water use in question but did not discharge the same. (see generally **AA Onderlinge Assuratie - Assosiasie Bpk v Beer** 1982 (2) SA 603 (A) on circumstantial evidence).

6. **DECISION:**

6.1. **In the result:**

6.1.1. the appeal fails; and


6.1.2. the directive is upheld;

6.2. The file shall, therefore, be closed.



L.J LEKALE

I concur.



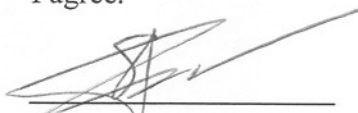
Dr. W. Singo

I agree.



H. Thompson

I agree.



A.S Hadebe