

IN THE WATER TRIBUNAL HELD AT PRETORIA

REF: WT 15/06/2007

In the hearing between:

MARIUS ELS

APPELLANT

and

THE DEPARTMENT OF WATER AFFAIRS

RESPONDENT

APPEAL RULING: 31 JULY 2009

APPEARANCES:

Coram : Mr L J Lekale (Chairperson)
Mr H Thompson (Member)
Mr A S Makhanya (Member)

For the Appellant : Mr M Els

For the Respondent : Mr L Mtshotshisa

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. This is a unanimous ruling on a point in *limine* raised by the Water Tribunal *mero motu* in the appeal hearing held on 30 June 2009 at Pretoria;
- 1.2. The Appellant, **Mr M Els**, represented himself in the matter; and
- 1.3. The Respondent was represented by **Mr L Mtshotshisa** from the Directorate Legal Services from the National Office of the Respondent.

2. ISSUE TO BE DECIDED:

- 2.1. The preliminary question effectively raised by the Tribunal of own accord was whether or not the Tribunal had the requisite jurisdiction to hear the appeal in terms of section 148(1)(f) of the National Water Act of 1998 (NWA).

- 2.2. In the event that the necessary jurisdictional facts existed, the Tribunal had to determine whether or not the Appellant was entitled to the relief he seeks in the appeal.

3. BACKGROUND TO THE ISSUE:

- 3.1. Mr Els bought the farm Bellevue 365 on auction for R1 026 000 during 2006 in the understanding that there was already a water right attaching to the property in the form of a permit issued in 1963 for the taking of 300,491 m³ of water per hour from a specific water resource.
- 3.2. After numerous studies and conversations with the office of the Department of Water Affairs and Forestry, as it was then known, in Potchefstroom, he learned that the entitlement associated with this permit fell by the wayside. The reason for that was that no water was taken from the water resource concerned for use on this property at any time during the period from 1 October 1997 to 30 September 1998. This period, known as the qualifying period, was two years immediately before the date of commencement of the NWA.
- 3.3. He then approached the Free State Regional Office of the Department in Bloemfontein on 8 May 2007 with a request to reinstate the entitlement as he had already incurred certain expenses regarding the supply of electricity amongst others.
- 3.4. The Regional Office informed Mr Els on 6 June 2007 that the application could not be considered due to the following:
 - 3.4.1. for a water use to be a continuation of an existing lawful water use under the NWA it should have been exercised during the qualifying period. As this water use was not exercised during this period, it did not qualify as an existing lawful water use.
 - 3.4.2. the property changed ownership a long time after the qualifying period and, in such a case, it was the responsibility of the new owner to determine the lawful water allocation on the property.
- 3.5. Mr Els was further informed that the only option he had was to acquire an entitlement through water trading in terms of section 25 of the NWA, i.e. the purchasing of water from someone who had an existing lawful water use.
- 3.6. Mr Els then appealed against this to the Water Tribunal with the request that the Tribunal should reinstate the entitlement, so as to allow him to develop the property economically.
- 3.7. It was, however, not clear from the papers filed with the Registrar of the Tribunal and the submissions made by the parties that there were, in fact, an application and a decision thereon as contemplated by section 148(1)(f), read with the provisions

- 4.8.1. if it related to section 32, which provided for the definition of an existing lawful water use, then in that case there is a guideline approved by a previous Minister about the requirements for a water use to be regarded as an existing lawful water use. The water use should have been permitted and there should have been proof that the use was exercised during the qualifying period. In the case of Mr Els, it seemed that the water use was permitted but not used during the qualifying period.
- 4.8.2. if it related to section 33, which provided for the declaration of a water use that was not an existing lawful water use to be an existing lawful water use, then in that event the guideline provides that the declaration can take place if there is a good reason why the water use was not exercised during the qualifying period although it was exercised previously. The guideline states what good reasons are, although it does not provide a closed list. Further, according to the guideline, an application to declare a water use an existing lawful water use should have been done before 1 October 2003, viz five years after the coming into operation of the NWA. Mr Mtshotshisa conceded that the guideline is only a policy and not a law.
- 4.9. Mr Mtshotshisa said that according to him there was never a proper application from the Appellant to declare the water use an existing lawful water use. There was only a letter and from this it was not clear whether irrigation took place on the property and, if it took place during the qualifying period, why it was stopped.
- 4.10. According to Mr Mtshotshisa the appeal should have been dismissed due to vagueness and ambiguity.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS:

- 5.1. The taking of water from the water resource situated on Bellevue 365 is in terms of section 21(a) of the NWA a water use. A person may only undertake this water use in terms of section 22(1) if the use is authorised. An authorisation could, among others, be in the form of a continuation of an existing lawful water use.
- 5.2. Certain water uses are *ex lege* existing lawful water uses while others should be declared as such.
- 5.3. Section 32 deals with when a water use is regarded as an existing lawful water use by law. In such a case a water use should actually have taken place at any time during the qualifying period. Further that use should have been authorized by or under a law which was in force when the NWA commenced.
- 5.4. A person may in terms of section 34 of the NWA continue with an *ex lege* existing lawful water use without any formal application to the Department until a license replaces it. But a person may require and obtain information regarding the matter from the Department.
- 5.5. As the water use under question has actually not taken place at any time during the qualifying period, it could not be an existing lawful water use as contemplated in

section 32 of the NWA. If there were any correspondence between the parties regarding this matter, it was probably to require, obtain and provide information on the requirements for a water use to be an existing lawful water use and to apply them to the use concerned.

- 5.6. Section 33 on the other hand deals with how to declare a water use that was not an existing lawful water use an existing lawful water use. A person should in terms of section 33(1) apply to a responsible authority to have a water use which is not *ex lege* an existing lawful water use to be declared an existing lawful water use. In such a case section 41 applies to the application, and deals with the procedural requirements for the license application.
- 5.7. A responsible authority may, among others, declare a water use that took place lawfully before the starting date of the qualifying period and which was discontinued for a good reason to be an existing lawful water use in terms of section 33(3)(a) of NWA.
- 5.8. On the facts before and submissions made to the Tribunal, the Tribunal was not satisfied that there was a formal application to the responsible authority to declare the water use concerned. In the light of the foregoing there could, therefore, not have been a formal decision by the responsible authority. Only where there is a formal application does section 41 apply.
- 5.9. According to section 148(1)(f) of the NWA there lies an appeal against a decision of a responsible authority on an application to which section 41 applies by the applicant.
- 5.10. The Tribunal was not satisfied that there existed an application and a decision so as to constitute the necessary appeal jurisdiction as contemplated in section 148(1)(f). Therefore the Tribunal did not have the requisite jurisdiction to deal with the matter.

6. RULING

- 6.1. In the result, the Tribunal does not have appellate jurisdiction over the matter.
- 6.2. The file shall, therefore, be closed.



H THOMPSON