IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 26/08/2008

In the application between:-

NORSAND HOLDINGS (PTY) LTD **APPELLANT**

and

THE DEPARTMENT OF WATER AFFAIRS AND FORESTRY **1ST RESPONDENT**

ACTING CHIEF DIRECTOR: WATER USE – DEPARTMENT OF WATER AFFAIRS AND FORESTRY **2ND RESPONDENT**

APPEAL DECISION : DATE 2009-04-23

APPEARANCES:

Coram	:	Mr. L.J Lekale	(Chairperson)
		Mr. A.S Hadebe	(Member)
		Mr. A.S Makhanya	(Member)
		Mr. H Thompson	(Member)
FOR THE APPELLANT	:	**Adv. A. Dodson** instructed by Messrs. Leppan Beech Inc. Attorneys	
Telephone No	:	(011) 250 5190	
Telefax No	:	086 678 0495	
FOR THE RESPONDENTS	:	**Adv. M.M Mojapelo** instructed by Department of Water Affairs and Forestry – Legal Services	
Telephone No	:	(012) 336 8292	
Telefax No	:	(012) 336 6799	

1. DETAILS OF HEARING AND REPRESENTATION:

1.1. This is a majority decision in an appeal hearing which was held at Pretoria on the 3rd April 2009;

1.2. The appellant was represented by **Adv. A Dodson** instructed by **Mr. Beech** of Leppan Beech Inc. Attorneys of Woodmead Johannesburg;

1.3. The respondent, on the other hand, were represented by **Adv. M.M Mojapelo** from Pretoria.

2. ISSUE TO BE DECIDED:

2.1. The question to be determined was whether or not the need to address the results of past racial and gender discrimination, as one of the factors that had to be taken into account by the Second Respondent, as a responsible authority, in issuing a water use licence, was relevant to or an overriding factor in the licence application involved herein;

2.2. In the event of the aforegoing question being decided in the affirmative, the next enquiry was whether or not the appellant managed to show that the grant of the relevant licence would have the effect of redressing the results of past racial and gender discrimination;

2.3. In the further event of the question in 2.2. above being decided in the affirmative, the Tribunal was requested by the Appellant to uphold the appeal and to direct the Respondents to issue the relevant licence.

3. BACKGROUND TO THE ISSUE:

The appellant applied unsuccessfully for a water use licence in terms of section 40 read with section 21 of the National Water Act (the Act) in March 2007.

The appellant, thereafter, lodged an appeal against the refusal of its application outside the prescribed time period and, eventually, applied successfully for condonation which was granted per a ruling dated the 13th February 2009.

The impugned decision was made and sent to the appellant on the 24th July 2008 after some additional information had been furnished by the appellant to the second respondent on the 25th June 2008.

In the Heads of Argument and during the hearing, **Mr. Dodson** abandoned a number of grounds on which the appellant's case was based and, effectively, confined the appeal to the issues set out in paragraph 2 above.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced. The appellant relied on, inter alia, affidavits submitted in support of its appeal in addition to the bundle prepared by the Registrar of the Water Tribunal.

4.2. Argument:

The parties submitted written Heads of Argument which were supplemented by oral submissions during the hearing.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The onus was generally on the appellant to prove that it was entitled to the relevant licence.

The reason advanced by the Second Respondent for refusing the application was that the application "**does not fulfil the requirements in terms of section 27(1) (b) as it does not promote the redress of the past racial and gender discrimination**".

Prior to the refusal of the application the second respondent directed a letter to the appellant dated the 23rd May 2008 in terms of which the latter was effectively given an opportunity to show cause within ninety (90) days why the application should not be declined on the said reason.

The appellant furnished the requested additional information through its holding company Anglo Platinum Limited with a view to showing, inter alia, that Anglo Platinum Limited is BBBEE compliant.

When the impugned decision was made the second respondent was already in receipt of the said additional information and was, as such, most probably aware of the appellant's shareholding, among others.

The real dispute between the parties, therefore, essentially revolved around the question as to whether or not the application promotes the redress of past racial and gender discrimination as contemplated by section 27 (1) (b) of the Act.

The appellant, however, contended that section 27 (1) (b) of the Act, as a factor which the second respondent had to consider in issuing the licence, was not relevant to the present matter and, if it was, it was not the overriding factor.

On their part, the respondents effectively maintained that the factor in question was both relevant and decisive in the determination of the appellant's application.

The onus on the appellant was, thus, limited to:

- first showing that the factor in question was not relevant to the application and, if it was, it was not an overriding or decisive factor; and

- if it was found that the factor in question was relevant and overriding, proving that the application satisfied the same.

A. RELEVANCY OF THE FACTOR IN QUESTION:

Mr. Dodson submitted at length to the effect that what the legislature required from the second respondent, as the responsible authority, was to consider the factor in question when she decided on the appellant's application in order to determine if it was relevant to the issue.

Once the second respondent had applied her mind to the relevant factor together with other relevant factors, so went **Mr. Dodson's** argument, she would have realised that it was not relevant insofar as the application was necessitated by the need to replace an existing dam wall which has been damaged by floods and has become extremely unsafe.

On behalf of the respondents, **Mr. Mojapelo** contended that the use of the imperative **"must"** clearly enjoined the second respondent to take all the relevant factors into account inclusive of those factors listed in section 27(1) of the Act.

It was, further, argued for the respondents that the second respondent had no option but to take the listed factors into consideration as the factors that ultimately determine an application for a licence or general authorization.

The majority of the members of the Tribunal agreed that the appeal should succeed but differed on whether or not the Tribunal had the legal competency or jurisdiction to entertain the appellant's argument on the relevancy or otherwise of section 27(1) (b) of the Act.

One view was that Mr. Dodson's argument was, in effect, an invitation to the Tribunal to apply the law to a dispute as opposed to looking at the merits of the decision appealed against. The view was that the Tribunal does not have jurisdiction to resolve a dispute about the lawfulness of the respondents' decision and that such a dispute is a legality matter which should be dealt with by the High Court in terms of section 6 of Promotion of Administrative Justice Act (PAJA). This view, therefore, required the Tribunal to determine the appeal only on the basis of the question as to whether or not the application promotes the redress of the past racial and gender discrimination without dealing with the relevancy issue.

The other view was that the Tribunal was as obliged to have regard to and apply the provisions of section 27 of the Act as the second respondent, being the responsible authority, was obliged to consider them. In the eyes of the adherents of this view Mr. Dodson's argument was to the effect that in rehearing the matter the Tribunal should disregard, after consideration thereof, the provisions of section 27(1)(b) of the Act as a relevant and / or decisive factor in the determination of the appellant's application. According to this view the Tribunal was competent to entertain and make a decision on the appellant's argument on this issue.

According to the said view point the provisions of section 27(1) of the Act are clear and require the responsible authority in the position of the second respondent to:-

(a) consider the listed factors together with any other factors that may be relevant to the application at hand;

(b) decide the application on the basis of the factors that may be relevant to it from all the material placed before it inclusive of the relevant listed factors.

In other words the listed factors are a statutory or prescribed component of the pool of factors from which factors relevant to any given application must be selected and applied.

Mr. Mojapelo countered that the safety factor was befuddling the real issue because, if it were the underlying cause or reason for the application, the appellant would only repair the dam with its wall at its present position without increasing the dam capacity by relocating the dam wall 40m downstream.

In his view the application was, effectively, for an increased impoundment of water masquerading as a licence necessitated by safety considerations.

It was, however, not disputed by the respondent parties that:-

(a) the dam wall has been damaged by floods and has become extremely unsafe;

(b) the proposed new dam wall is not intended or motivated by the desire to impound water per se but will serve to impede the water flow and retain the water for recreational purposes as opposed to consumption;

(c) only a small quantity of the water impounded will be lost mainly through evaporation and infiltration into the ground;

(d) according to the report prepared by the appellant's consultants the option of relocating the dam wall 40m downstream is the most appropriate and the least risky of the options available to the appellant;

(e) the decision to build the proposed new dam wall is also motivated by the need to accommodate for the 1:200 year flood with the new dam wall serving as the last line of defence in times of floods according to the consultants' report which accompanied the application (see page 33 of the bundle).

Applying the **sine qua non** or **"but-for"** test for causation, the holders of the relevant view were satisfied from available material that:-

- were it not for safety considerations the application would most probably not have been made;

- the increase in the water capacity of the dam is incidental to the matter and is not the sole or main reason for the application. (see generally **Minister of Police v Skosana 1977(1) SA 31 (A)** on the **sine qua non** test).

The proponents of this view felt that the redress factor is not relevant to the determination of an application for water use licence where, inter alia, safety is the main, if not the only, motivation underlying the application.

The said members of the Tribunal felt that the contention that the appellant can go for other more risky options was, with respect, out of line with human experience and sound economic, technical and environmental considerations regard being had to, inter alia, the fact that it was not in dispute that all water uses on the appellant's farm have been previously registered and the intended water use is for recreational purposes.

The adherents of this view felt that even if they were wrong in the aforegoing position, they were satisfied that the redress factor was not an overriding or decisive consideration in a matter where all other prescribed factors have been satisfied and an additional relevant factor was related to safety considerations and agreed with the proponents of the other view that:-

- the appellant does not conduct business in the tourism sector but, in fact, uses the facility in question for educational and relaxation or recreational purposes for the benefit of the employees of Anglo Platinum Limited and its subsidiaries. In this regard it was not disputed that the appellant's holding company viz. its sole owner conducts business in the mining sector and the facility for which the licence is required is being and is to continue to be used for the benefit of the employees of its holding company;

- the appellant's holding company, therefore, has to comply with the charter applicable to the sector in which it conducts business;

- the appellant, thus, satisfies the redress factor insofar as its holding company undisputedly complies with the mining charter;

- the respondents relied on the tourism charter in their submissions but did not provide the Tribunal with the benchmark against which the appellant's compliance with the redress factor was measured. In this regard it should be noted that, as correctly argued for the appellant, the **Broad-Based Black Economic Empowerment Act No. 53 of 2003** requires, in section 10, the respondents to take into account and apply, as far as is reasonably possible, any relevant code of good practice issued in terms thereof in, inter alia, determining qualification criteria for the issuing of licences, concessions or other authorities in terms of any law;

- the Tribunal was not satisfied that the document issued by the Department of Water Affairs and Forestry entitled **"Broad-Based Black Economic Empowerment Guidelines For Water Allocation"** was applicable herein as the purpose of the dam concerned is not to allocate water and the water uses involved do not constitute an allocation activity;

- no code of good practice was placed before the Tribunal with the appellant party placing a draft code of good practice for the tourism sector published in Government Notice No. 783 on 20th June 2008 and contained in Government Gazette No. 31168;

- a submission by **Mr. Dodson** to the effect that no final code of good practice for the tourism sector has yet been published was not disputed by the respondents.

B. APPROPRIATE RELIEF:

The appellant requested the Tribunal to ensure finality in the matter by, inter alia, directing the respondents to issue the licence bearing in mind the present condition of the dam wall as well as the fact that the authorization for the construction of the dam wall obtained in terms of the National Environmental Management Act No. 107 of 1998 **(NEMA)** falls to expire on the 8th August 2009.

Mr. Mojapelo contended, on behalf of the respondents, that the Tribunal's powers include review powers and that, in the event of the appeal succeeding, it would be appropriate for the Tribunal to remit the matter back to the second respondent for reconsideration in the light of additional information furnished by the appellant.

As correctly submitted by **Mr. Dodson**, the additional information involved herein was before the second respondent at the time when the impugned decision was made.

The Tribunal was of the considered view that:

* to remit the matter to the respondents for re-consideration will amount to dereliction of duty on the part of the Tribunal insofar as the matter came before it by way of an appeal which takes the form of a rehearing (see item 6(3) of Schedule 6 to the Act);

* although the Act does not prescribe competent decisions that the Tribunal may make on appeal, the Tribunal is, in law, entitled to make decisions that fall within the competency of the respondents, as responsible authorities;

* it was in the position to make an appropriate decision on the basis of the material properly before it after hearing the appeal.

The Tribunal noted without deciding the issue that:

* **Mr. Dodson** submitted that the process intended by the appellant involves 4 (four) water uses contemplated by sections 21(b), 21(c), 21(i) and 21(k) of the Act. **Mr. Mojapelo**, on his part, did not address the issue in question specifically;

* in her decision the second respondent only mentioned 3 (three) water uses viz. sections 21(a), 21 (c) and 21(i) of the Act;

* the appellant, on its part, mentioned in the application that the proposed upgrade of the relevant dam constitutes 2 (two) section 21 water uses viz. storage (section 21 (b) and recreation (section 21 (k)).

The Tribunal was satisfied that the appeal was against the refusal of a water use licence and not about the kind of water uses that have to be licensed. It was, thus, not necessary for the Tribunal to make any decision on this issue. Even if the Tribunal was enjoined to determine the issue in question, it was not satisfied that it had all the

necessary information to make an appropriate decision regard being had to, inter alia, the following:-

* according to Schedule 1 to the Act, recreation does not require licensing;

* it was possible that the proposed activity does not involve the taking of water from a water resource and, as such, section 21(a) was not applicable.

6. **DECISION:**

6.1. In the premises the appeal succeeds and the relevant water use licence shall be issued by the second respondent on or before the 7th June 2009;

6.2. The file shall be closed.

L.J LEKALE
Chairperson