

1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1. An application for condonation of the late lodging of an appeal was heard in Pretoria on the 6th February 2009;
- 1.2. The applicant was represented by **Adv. A Dodson** from the Johannesburg Bar while the respondents, on their part, were represented by **Mr. T. Mashala**.

2. ISSUE TO BE DECIDED:

- 2.1. The first question to be determined was whether or not the appeal was lodged within the 30 (thirty) day period prescribed by Section 148(3) of the National Water Act (the Act) read with the provisions of Rule 4(1) of the Water Tribunal rules (the rules) for the commencement of appeals.
- 2.2. Should the foregoing question be decided in the negative, then and only in that eventuality, the next enquiry was whether or not good reason for condonation of the late lodging of the appeal existed within the contemplation of item 5(2) of Schedule 6 of the Act read with the provisions of Rule 4 (4) of the rules.
- 2.3. In the further event of the question in 2.2 above being decided in the affirmative, the Tribunal was required to condone the late lodging of the appeal and to proceed to entertain the appeal in terms of the Act.

3. BACKGROUND TO THE ISSUE:

The applicant applied for a water use licence in terms of section 21 of the Act in March 2007.

A decision refusing the licence was made and sent to the applicant on the 24th July 2008 after the requested additional information was furnished by the applicant on the 25th June 2008.

The applicant, thereafter, lodged an appeal on the 25th August 2008. The respondents, on their part, furnished reasons for the decision as required by item 5 (3) of Schedule 6 to the Act on the 10th October 2008. The applicant subsequently submitted a supplementary notice of appeal after having delivered an application for condonation of the late lodging of the appeal on the 16th October 2008.

The matter was, eventually, scheduled for a hearing on the 6th February 2009, it being contemplated that the application for condonation shall be heard first and, if it succeeds, the Tribunal shall proceed immediately thereafter to hear the appeal.

The Tribunal, however, reserved its ruling on the application. The Tribunal felt, inter alia, that it would be proper and appropriate to give a written ruling regard being had to the provisions of item 9 (1) of Schedule 6 to the Act.

4. SURVEY OF EVIDENCE AND ARGUMENT:

4.1. Evidence:

No oral evidence was adduced. The parties made verbal submissions and the applicant party, further, submitted **Heads of Argument** and relied on the affidavit filed in support of the application.

4.1.1. Applicant's Version:

The candidate attorney attached to the office of the applicant's attorney, one **Joscelyne Moira Devenish** deposed to, inter alia, the following effect:

- (a) the Notice of Appeal was served and filed on the 25th August 2008 and, as such, the appeal was 1 (one) day late;
- (b) the statutory 30 (thirty) day period limited for lodging an appeal expired on the 23rd August 2009 which fell on a Saturday;
- (c) she attempted to contact the Tribunal through the telephone numbers furnished to the applicant by the respondents in the letter communicating the refusal of the application on the 13th August 2008 but learnt that the number in question was for Dam Safety;
- (d) on the 13th August 2008 she attempted several times to contact the Registrar of the Tribunal without success in an endeavour to establish the Tribunal's correct service address;
- (e) she only managed to get hold of the Registrar on the 25th August 2008 when the Tribunal's physical service address was furnished to her;
- (f) the applicant has good prospects of success as set out in its Notice of Appeal insofar as:-
 - it, inter alia, complied with the provisions of the Broad Based Black Economic Empowerment Charter for the Mining Industry (the Mining Charter), the Mining Charter Scorecard and the Social and Labour Plan;
 - the respondents were supposed in terms of Section 27 of the Act, to take all the relevant facts into account in deciding whether or not to issue the licence;
- (g) the balance of convenience favours the granting of the relief requested because a delay of 1 (one) day would not prejudice the respondents while the licence in question is important to the applicant and the refusal of the condonation application will severely prejudice the applicant.

4.2. Argument:

A. The applicant's submissions:

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

- (a) the purpose of the application for a water use licence was to enable the applicant to build a new dam wall on its property in order to replace an existing dam wall which has been damaged by floods and has become extremely unsafe;
- (b) condonation is not necessary because:
 - according to Section 148(3) of the Act an appeal should be commenced within 30 (thirty) days after, inter alia, “**reasons for the decisions are given**”;
 - the reasons for the decision in the present matter were given on the 10th October 2008 under cover of a letter from the first respondent’s Director: Legal Services;
 - the 30 (thirty) day period, thus, commenced to run on the 10th October 2008 and ended on the 10th November 2008 by which date the appeal had long been lodged;
- (c) in the alternative and, if it is found that the appeal was, in fact, late, then and only in that event, the applicant has made out a case for condonation insofar as:
 - there existed a reasonable explanation for the delay giving rise to the need for condonation; and
 - the applicant has a bona fide case;
- (d) the delay was minimal and the applicant lodged the appeal on the first working day on which it received the necessary information from the Registrar of the Tribunal;
- (e) the said first working day also happened to be the first working day after the expiry of the prescribed 30 (thirty) day period;
- (f) the applicant is a wholly owned subsidiary of the Anglo Platinum Management Services (Pty) Ltd which, on its part, complies with the Mining Charter, the Score Card and the Social and Labour Plan;
- (g) the short delay involved is fully and properly explained in the affidavit of Ms. Devenish;

- (h) it is in the interests of justice that condonation be granted.

B. The respondents' submissions:

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

- (a) according to the information at his disposal the applicant's Ms. Devenish was, most probably, referred to the Tribunal's website when she made enquiries after the service address;
- (b) the said Devenish waited for 12 (twelve) days before she sought to get confirmation of the contact details;
- (c) The applicant waited until it was 1 (one) day late before it could establish correct details;
- (d) The applicant has no prospects of success in the appeal insofar as:
- although the application for a water use licence was brought by **Whiskey Creek** the additional information required was furnished by another entity viz. Anglo Platinum Management;
 - the applicable charter was the Tourism Charter and not the Mining Charter;
 - the applicant erred in relying on the Mining Charter.

5. ANALYSIS OF EVIDENCE AND ARGUMENT:

The onus was on the applicant to prove that:-

- the appeal was lodged timeously; and if not
- good reason existed for condonation within the contemplation of item 5 (2) of Schedule 6 to the Act read with the provisions of Rule 4 (4) of the rules.

In the first instance the applicant contended that the appeal was lodged timeously insofar as the reasons for the decision refusing the licence were furnished on the 10th October 2008 and after the fact of lodging the appeal.

The Tribunal was, however, of the view that, on proper construction of the provisions of Section 148(3) of the Act and as mirrored by Rule 4 (1) of the rules, the determinative date for the calculation of the 30 (thirty) day period depends on the event after which the appellant commences the appeal.

What is envisaged, in the Tribunal's understanding, is that after a decision has either been published in the Gazette or sent to the appellant, the appellant has a choice of either

commencing an appeal within 30 (thirty) days after the date of publication / dispatch of the decision or requesting reasons for the decision. Where the appellant decides to lodge an appeal after the publication or dispatch of the decision, the prescribed period starts running from the date of such an event viz. publication or dispatch of the decision. Where, however, the appellant requests reasons for the decision before he can lodge an appeal the 30 (thirty) day period is postponed and only starts running from the date on which the reasons for the decision are given.

The reasons contemplated in section 148(3) of the Act are, most probably, those requested by the appellant in terms of, inter alia, the **Promotion of Administrative Justice Act (PAJA)** and not those required by item 5 (3) of Schedule 6 to the Act to be furnished within a reasonable time after the lodging of an appeal. The latter dispatch of reasons is, in the Tribunal's view, triggered by the lodging of an appeal and not by any request from the appellant. The said dispatch, clearly, happens ex post facto and by reason of the commencement of an appeal.

In the present matter the applicant elected to commence the appeal on the basis of the dispatch of the decision viz. the sending of the notice of the decision and did not request reasons before it could lodge an appeal.

The appeal was, thus, commenced after the prescribed time limit. It was, therefore, necessary for the applicant to apply for condonation.

Condonation:

As was correctly and effectively submitted by **Mr. Dodson**, an enquiry into whether or not good reason or cause for condonation exists generally entails consideration of factors such as existence of reasonable explanation of the delay and presence of bona fide case or defence.

The relevant factors have to be considered together without emphasizing one over the others and include those dealt with below. (see **Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A)**).

(a) **Degree of lateness:**

The applicant party contended that the delay was minimal and was limited to 1 (one) day insofar as the prescribed time period expired on a Saturday and the appeal was lodged on a Monday immediately following the expiry date.

The Tribunal was, however, of the view that the appeal was noted some 2 (two) days too late insofar as the statutory period did not expire on a Sunday and, as such, the Sunday in question formed part of the period of delay. The fact that the said Sunday was not a working day for the business of the Tribunal was of no consequence insofar as the prescribed period is calculated with reference to calendar days as opposed to working days.

(b) **Explanation of the delay:**

The applicant effectively attributed the delay to the wrong telephone details furnished to it by the respondents as well as inability, on the part of its lawyers, to get in telephonic contact with the Registrar of the Tribunal.

Although the Tribunal was not satisfied with the lack of information with regard to, inter alia, the date on which the attorneys received instructions as well as the reason why the appeal was not lodged per registered mail as the Tribunal's postal address was apparent from the notice of the decision sent by the respondents to the applicant, the Tribunal noted that:

- * neither the Tribunal's service (physical) address nor its contact telephone numbers are apparent from the Act and the rules;
 - it was not in dispute that the telephone numbers furnished by the respondents to the applicant were wrong;
 - the rules of the Tribunal do not prescribe the manner of filing or service with the Registrar.

It was, in the Tribunal's view, possible that the applicant was reasonably discouraged from using the postal address furnished by the respondents by the fact that the telephone numbers furnished proved to be incorrect.

In the light of the fact that the period of the delay was not inordinate and was, in fact, minimal and there were some shortcomings in the rules of the Tribunal, the Tribunal was of the view that the reason furnished for the delay was both adequate and acceptable regard also being had to the fact that it was, effectively, not in dispute that the applicant demonstrated an intention to appeal as early as the 13th August 2008. There was nothing before the Tribunal to suggest that the applicant abandoned such an intention at any stage after the 13th August 2008.

(c) **Prospects of success:**

The test for prospects of success is a bona fide case which prima facie carries prospects of success (see **Chetty v Law Society (Tvl) 1985 (2) SA 756 (A)**).

It suffices, for the purposes of proving that the applicant has reasonable prospects of success in the appeal, to make averments which, if proved at the appeal hearing, would entitle it to the relief it seeks (see **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0) @ 476**).

The Tribunal was satisfied that the applicant managed to show that it has a *bona fide* case which prima facie carries prospects of success insofar as:

- it was not disputed that Section 27 of the Act requires the respondents to take all the relevant factors into account in deciding the application for a water use licence, among others;

- it was, further, not disputed that the purpose of the application for a water use licence herein was to enable the applicant to build a new dam wall in order to replace an existing one which has been damaged by floods and which has become extremely unsafe.

(d) **Prejudice to the respondents:**

It was not apparent from the application that there would be any prejudice to the respondents if the application was granted. No submissions with regard to prejudice to the respondents were, in fact, made by **Mr. Mashala**.

The Tribunal was, further, satisfied that no reasonable prospects of prejudice to the respondents existed insofar as:-

- their case is based on documents which were made available to the Registrar and the applicant together with their reasons for the decision;
- the minimal, if not negligible, delay involved vitiated against any prejudice resulting.

6. **RULING:**

- 6.1. In the result the application is granted and the delay in lodging the appeal is hereby condoned;
- 6.2. The Registrar of the Water Tribunal shall, therefore, schedule the appeal for a hearing in due course and the parties shall be notified accordingly.

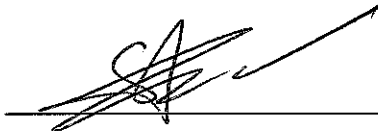


L.J LEKALE
Chairperson

We agree.



DR. W. SINGO



Mr. A.S HADEBE



Mr. A.S MAKHANYA



Mr. H THOMPSON