

**IN THE WATER TRIBUNAL**

**HELD AT PRETORIA**

**WT: 19/11/2007**

In the appeal between:

**OORSPRONG BOERE TRUST 904/90**

**APPELLANT**

**AND**

**CROCODILE RIVER MAJOR IRRIGATION BOARD**

**FIRST RESPONDENT**

**THE TENBOSCH SUB-IRRIGATION BOARD**

**SECOND RESPONDENT**

**THE MINISTER OF WATER AFFAIRS AND FORESTRY**

**THIRD RESPONDENT**

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**APPEAL DECISION**

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**APPEARANCES:**

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

Appellant : None

First Respondent : Adv. L.I Vorster SC  
c/o Frans Meyer Inc.  
P.O. Box 130  
MALELANE  
1320

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

- 1.1. The appeal hearing was held on the 3<sup>rd</sup> November 2008 at Pretoria;
- 1.2. The hearing proceeded in the absence of the Appellant party in terms of Rule 9(1) of the Rules of the Tribunal after the appellant's representative notified the Registrar of the Tribunal that the appellant was invoking the provisions of Rule 9(1)(a) of the Tribunal Rules by not availing itself of the sitting;
- 1.3. The First Respondent, on its part, was represented by Adv. **L.I Vorster SC** instructed by **Messrs. Frans Meyer Inc**, Attorneys;
- 1.4. The other respondents cited were not involved in the matter after it became clear that the First Respondent was responsible for the decision being appealed against.

2. **ISSUE TO BE DECIDED:**

- 2.1. The first preliminary question raised by the Tribunal of own accord was whether or not the hearing could, in law and / or equity, proceed without the **J.C Tecklenburg Trust** having been joined as a respondent regard being had to the fact that it was the beneficiary of the decision being appealed against;
- 2.2. The second preliminary question which the Tribunal had to satisfy itself on before it could assume jurisdiction over the appeal was whether or not it had appellate jurisdiction over the real cause of the appellant's grief regard being had to the fact that the appellant felt aggrieved by the alleged failure of the First Respondent to afford it a lawful, reasonable and procedurally fair administrative action contemplated by the **Promotion of Administrative Justice Act, 2000 (PAJA)**;
- 2.3. In the event of the foregoing questions being decided in the affirmative, the next enquiry was whether or not the rights of the Appellant were materially and adversely affected by the decision of the First Respondent so as to entitle the Appellant to a procedurally fair administrative action within the contemplation of section 3 of PAJA.

3. **BACKGROUND TO THE ISSUE:**

On the 10<sup>th</sup> October 2007 the First Respondent granted one **J.C Tecklenburg Trust** temporary transfer of a water use authorization in terms of Section 25(1) of the **National Water Act, 1998 (the Act)**.

On the 8<sup>th</sup> November 2007 the appellant became aware of the foregoing state of affairs after an alleged unlawful pipe was laid on its land without its consent and / or a servitude having been granted to J.C Tecklenburg.

On the 20<sup>th</sup> November 2007 the appellant lodged an appeal against the decision of the First Respondent in terms of section 148(1)(d) of the Act and cited the Second and Third Respondents as co-respondents.

The outcome prayed for by the Appellant in the notice of appeal is effectively a declaratory order declaring the First Respondent's decision invalid on the basis that it

was administratively unjust insofar as it was allegedly biased and did not comply with the rule of natural justice relating to **audi alteram partem**.

The First Respondent furnished reasons for its decision and accepted full responsibility for its decision with the result that the Second and Third Respondents took the back seat and played no role at all in the appeal.

The matter was eventually placed on the roll for the hearing and the Appellant was notified accordingly.

On the morning of the hearing the Registrar of the Tribunal placed a letter from the Appellant's representative before the Tribunal and the First Respondent's representative. In the letter in question the appellant literally invoked the provisions of Rule 9 of the Rules of the Tribunal and unequivocally waived its right to be represented at the hearing.

At the commencement of the hearing the Tribunal noted that, although the relief sought by the appellant, if granted, would directly and substantially affect J.C Tecklenburg Trust, the said Trust was not joined as a respondent and was, thus, not before the Tribunal.

The Tribunal, therefore, required Adv. Vorster to address it on the issue **ante omnia** and, because the Appellant was not represented, the Tribunal was unfortunately not privileged to hear the appellant's representations in that regard.

Adv. Vorster conceded that the appeal suffered from non-joinder but took the matter further by, effectively, contending that the appellant was not an affected party from the water perspective when the First Respondent considered J.C Tecklenburg Trust's application and, as such, was not entitled to a hearing.

The Tribunal, further, noted that the appeal was entirely based on the provisions of PAJA. The Tribunal was, thus, left in doubt as to whether or not it was, in law, authorized to exercise powers of judicial review conferred by PAJA. Once again the Tribunal did not have the benefit of hearing the appellant out and was limited to the representations of Adv. Vorster for the First Respondent.

#### 4. **SURVEY OF EVIDENCE AND ARGUMENT:**

##### 4.1. **Evidence:**

No oral evidence was adduced. The appellant specifically relied on the documents filed of record with the Registrar while Adv. Vorster submitted Heads of Argument at the hearing.

##### 4.1.1. **Documents submitted:**

- (a) Exhibit A : Letter from Maritza Uys, the appellant's representative dated the 3<sup>rd</sup> November 2008;
- (b) Exhibit B : First Respondent's Heads of Argument.

#### 4.2. Argument:

**Adv. Vorster** submitted to, inter alia, the effect that:

- (a) J.C Tecklenburg Trust (Trust) should, in fact, have been joined as a respondent;
- (b) the Tribunal should, first, determine whether or not the appeal has merit before it can decide to join the Trust as a respondent;
- (c) the appeal has no merit insofar as the Trust already had entitlement to the relevant water use and only applied for and secured permission to use the said water on another farm belonging to it temporarily;
- (d) the appellant was, thus, not affected by the decision in question and did not have any legitimate expectation to be heard before a decision in that regard could be made;
- (e) the appellant, in fact, felt aggrieved by the pipe which it alleges was laid unlawfully on its land in order to convey water to the Trust's other farm;
- (f) the issue had nothing to do with the First Respondent insofar as the Trust only acquired a right to claim a servitude over the appellant's intervening land upon securing the temporary transfer of authorization.

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

The onus was on the appellant to prove that the appeal did not suffer from **non-joinder** and that the Tribunal had the requisite jurisdiction to adjudicate the appeal.

The appellant was not represented at the hearing and its papers filed of record did not deal with the relevant issues.

##### 1. NON-JOINDER:

Non-joinder is the failure of a plaintiff to join a particular defendant with another whom he is suing in circumstances in which the law requires that both should be sued together, or the failure by the plaintiff to join with himself as co-plaintiff another person whom the law requires should be joined when suing a particular defendant or defendants.

The test is whether or not such other person who is not joined has a "**direct and substantial interest**" in other words, a legal interest in the subject-matter of the litigation which may be affected **prejudicially by the judgment of the Court**. (see **Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953(2) SA 151 (0) @ 168-170** and **P.E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) S.A 794 (A) @ 804B-E**).

The rule is that any person who has a **direct and substantial interest** in any order the court might make, or who is bound to be affected prejudicially by the

putting into effect of a court order, is a **necessary party** and should be joined, unless the court is satisfied that he has **waived** his right to be joined. (see **Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637 (A) @ 659** and **Old Mutual Life Assurance Co. (S.A) Ltd v Swemmer 2004 (5) SA 373 (SCA) @ 381D-E**).

The effect of non-joinder is not nullity. The effect is that any person with an interest cannot subsequently be defeated by the **exceptio res judicata** (a plea or exception that the matter has already been finally ruled or decided upon by the competent court). (see **Amalgamated Engineering Union v Minister of Labour (supra)**).

If a person is interested and should be a party, the court may **proprio motu** stay the action until he has been joined or intervened or has waived the right to be joined or to intervene or has consented to be bound by the outcome of the case. (see **Abrahamse v Cape Town City Council 1953 (3) SA 855 (C )**, **1954(2) SA 178 (A)**; **Amalgamated Engineering Union v Minister of Labour (supra)**; **Selbourne Furniture Store (Pty) Ltd v Steyn NO 1970 (3) SA 774** and **Klep Valves (Pty) Ltd v Saunders Valve Co. Ltd 1987 (2) SA 1 (A) @ 39-40**).

A magistrate's court may **proprio motu** take a point that a necessary party was not joined and give an absolution (see **Natal Asbestos Co. Ltd v Cox (1923) 44 NLR 462**).

In the present matter it was patent from the papers filed by the appellant as well as the reasons furnished by the First Respondent and submissions by Adv. Vorster that the Trust was a necessary party. There was no evidence before the Tribunal to prove that the Trust had waived its right to be joined or has consented to be bound by the outcome of the appeal. In fact there was even no proof before the Tribunal that the Trust was aware of the appeal or was served with the notice of appeal. In this regard it should be noted that the Rules of the Tribunal and the Act do not expressly oblige the appellant to furnish proof of service on the respondents to the Tribunal.

It was, thus, not practical to join JC Tecklenburg Trust where its particulars were not properly before the Tribunal and the Appellant was not present to assist in that regard.

## 2. JURISDICTIONAL ISSUE:

The Tribunal is as much a creature of statute as the Magistrates' Courts are. It can, therefore, not do anything which is not contained within the four corners of its enabling Act (the Act) in the same way as the Magistrates' Courts cannot do anything which the Magistrates' Courts Act does not specifically authorize them to do so. (see **Ndamase v Functions 4 All 2004(5) SA 602 (SCA) @ 605 F-A**).

The fact that the Magistrates' Courts do not have inherent jurisdiction and have no jurisdiction beyond that granted by the statute creating them does not, necessarily, mean that they have no powers which are not stated in so many words in their constituent Act. Authority may be implied as well as expressed. When the Act gives jurisdiction to the court on the main subject in dispute, its purpose is not to be defeated because the



ancillary powers which are necessary to enforce that jurisdiction have not been specifically mentioned. The doctrine of implied jurisdiction can only arise where the Act is silent. (see **Wilson v Gandy 1907 TS 249 @ 250**).

The principles applicable to the Magistrates' Courts are, in the opinion of the Tribunal, applicable to the Tribunal insofar as the decisions of the Tribunal are appealable, on questions of law, to the High Court and such appeals must be prosecuted as if they were appeals from a Magistrates' Court to a High Court. (see **section 149 of the Act**).

Section 148 of the Act specifically grants the Tribunal the power to hear appeals on matters set out therein.

According to Schedule 6 item 6 (3) of the Act appeals and applications before the Tribunal take the form of a rehearing.

Section 1 of PAJA defines a "**tribunal**" as an independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of PAJA.

As was held by Innes CJ in *Wilson v Gandy* (supra):

**"In regard to matters upon which the Proclamation does touch, the magistrates should keep within the term of the statute"**.

The Act grants the Tribunal express appellate jurisdiction over certain specified matters set out in section 148. It follows that the only implied powers would be those ancillary powers which are necessary to enforce that jurisdiction which has been specifically mentioned.

The Appellant in the present matter grounded its appeal on **PAJA** and seeks to have the decision of the First Respondent reviewed on the basis that it was not granted a procedurally fair administrative action because it was an affected person.

Section 6(2) of **PAJA** bestows the power of judicial review of administrative action on a court or a tribunal.

The present Tribunal is, however, not a court nor is it a tribunal contemplated by PAJA insofar as it was not established for the purposes of reviewing administrative actions and it was, further, not established in terms of **PAJA**.

The fact that appeal hearings before the Tribunal take the form of rehearing effectively imply, inter alia, that the Tribunal was required to, inter alia, hear J.C Tecklenburg Trust's application in terms of Section 25 of the Act with due regard to the reasons furnished by the First Respondent for granting the same.

The appeal contemplated by section 148(1)(d) read with schedule 6 of the Act is, probably, limited to the parties directly involved in the matter with the appellant being the one whose application for temporary transfer of a water use authorization has been turned down. (see **Bailey v CIR 1933 AD 204 @ 220** and **CIR v Da Costa 1985(3) SA 768 (A)** on the nature of the jurisdiction exercised by a tax court which was found not to be a court of appeal in the ordinary sense but a court of revision with powers to investigate the matter before it and to hear evidence thereon).

In the considered opinion of the Tribunal and as effectively contended by Adv. Vorster the phrase "by a person affected thereby" in section 148 (1)(d) of the Act should, in the present matter, be interpreted restrictively to mean the applicant in the section 25 (1) application.

6. **DECISION:**

6.1. **In the premises:**

6.1.1. J.C Tecklenburg Trust is a necessary party and the appeal cannot proceed without it;

6.1.2. the tribunal does not have jurisdiction to review the decision of the First Respondent judicially in terms of PAJA;

6.2. The appeal is, thus, dismissed as being out of jurisdiction and the file shall be closed.



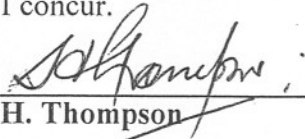
L.J LEKALE

I agree.



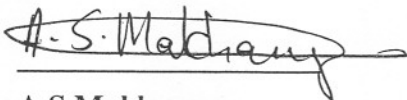
Dr. W. Singo

I concur.



H. Thompson

I agree.



A.S Makhanya