

**IN THE WATER TRIBUNAL
HELD AT THE PROTEA HOTEL CAPITAL IN PRETORIA**

REF: WT 24/01/2011

In the application for condonation between:

P H M VERMAAK

APPLICANT

and

THE DEPARTMENT OF WATER AFFAIRS

RESPONDENT

CONDONATION RULING: 3 JUNE 2011

1. APPEARANCE, REPRESENTATIONS AND DETAILS OF HEARING

- Coram : Dr. W Singo (Deputy Chairperson of the Water Tribunal and Presiding Officer of the hearing)
- Mr. H Thompson (Member of the Water Tribunal)
- Mr. A S Makhanya (Member of the Water Tribunal)
- Mr. A S Hadebe (Member of the Water Tribunal)
- For the Applicant : Mr. M Grütter from Martin Grütter Attorney of Lyttelton, Pretoria
- For the Respondent : Mr. T M Sedibe, legal officer from the Directorate: Legal Services of the Department of Water Affairs

1.1. This is a majority ruling in the application for condonation heard on 3 June 2011 at the Protea Hotel Capital in Pretoria.

1.2. The proceeding was recorded mechanically on 1 audio tape.

2. ISSUE TO BE DECIDED

2.1. The question to be answered by the Water Tribunal was whether there is a good reason to condone the late lodging of an appeal by the Applicant against a decision of the Respondent dated 27 November 2010.

3. BACKGROUND TO THE ISSUE

- 3.1. The Applicant applied for a licence in terms of section 41 of the National Water Act 36 of 1998 (NWA) to use water on the property Portion 3 of Draaihoek 82.
- 3.2. As part of the application, 1.4 ha of existing lawful water use in respect of the property Portion 121 of Quacha 49 would be surrendered in order to facilitate the licence application of the Applicant.
- 3.3. The Responsible Authority informed the Applicant by a letter dated 27 November 2011 that the "... application has been received ... however it cannot be processed. Kindly note that the property Draaihoek 82 Portion 3 is currently under the land claims program in terms of the Restitution of Land Rights Act 1994 ..."
- 3.4. The Applicant appealed against this in terms of section 148(1)(f) of the NWA by a letter dated 21 January 2011 to the Water Tribunal and the Registrar of the Tribunal stamped the appeal with the Registrar's stamp on 2 February 2011.
- 3.5. According to section 148(3)(b) an appeal must commence within 30 days after notice of the decision was sent to the appellant concerned. The appeal was lodged about a month late.
- 3.6. The Applicant applied in terms of rule 4(4) of the Rules to the Water Tribunal for the condonation of the late lodging of the appeal.

4. SURVEY OF EVIDENCE AND ARGUMENTS

Evidence and documents submitted

- 4.1. No oral evidence was adduced. Both the Applicant and Respondent made oral submissions through their respective representatives.
- 4.2. The Bundle from the Registrar of the Water Tribunal also forms part of the evidence and arguments analysed by the Tribunal.

Contents of the documents submitted by the Appellant and also argued

- 4.3. The Applicant received the letter containing the decision dated 27 November 2010 on or about 24 December 2010.
- 4.4. The Applicant was away before 24 December 2010 and only returned home at that time.

- 4.5. As it was the festive season, the Applicant could only hand the letter to his attorney at Nel Mentz Incorporate after they have opened their offices at the end of the festive season. The legal representative of the Applicant could not say when the office of Nel Mentz opened. He was only briefed on the matter four days ago.
- 4.6. The attorneys of the Applicant then researched and prepared the necessary appeal documentation together with an application for condonation of the late lodging of the appeal. The Applicant signed the documents on 21 January 2011 and the documents were then handed in at the Registrar on 27 January 2011.
- 4.7. According to the Applicant the letter from the responsible authority stated that the application was not processed as his property is subject to a land claims program in terms of the Restitution of Land Rights Act 22 of 1994.
- 4.8. The Applicant stated that he has no knowledge about any claim lodged against his property and no documents regarding that have been served on him.
- 4.9. Once a claim for the restitution of land has been lodged and the land claims commissioner concerned is satisfied with the claim, he must in terms of section 11(1) of the Restitution of Land Rights Act 22 of 1994 publish a notice thereof in the *Government Gazette* and make it known in the district in which the land in question is situated.
- 4.10. The Applicant is not aware of any such publication in the *Government Gazette* regarding his property.
- 4.11. Even if a land claim has been lodge but not published, then it is not a true claim yet.
- 4.12. According to the Applicant the degree of lateness of the appeal is not severe.
- 4.13. The Applicant had not investigated the matter regarding the land claim as the property referred to in the letter from the responsible authority is according to their records not subject to such a claim. Only during the condonation hearing was the Applicant informed which property is subject to a claim and that should still be investigated to enable him to comment on the prospect of success of the matter.

Arguments by the Respondent

- 4.14. The Respondent pointed out that it is not the Applicant's property that is subject to a land claim, but Portion 121 of Quacha 49. The existing lawful water use in respect to this property would be surrendered in order to facilitate

the licence application of the Applicant. Reference to the wrong property was due to an administrative error.

- 4.15. The Respondent raised the point whether the responsible authority has taken a decision against which an appeal could be lodged in terms of section 148(1)(f) of the NWA because the letter dated 27 November 2010 only states that the "... application has been received ... however it cannot be processed."
- 4.16. The Respondent is not opposing the condonation.
- 4.17. The Respondent stated that the degree of lateness of the appeal is not severe but the prospect of success is shaky, but they will deal with the merits thereof on appeal, if the condonation is granted.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1. According to section 148(1)(f) "[t]here is an appeal to the Water Tribunal against a decision of a responsible authority on an application for a licence under section 41 ... by the applicant [for the licence]."
- 5.2. The letter dated 27 November 2010 sent to the Applicant states that the "... application has been received ... however it cannot be processed. Kindly note that the property Draaihoek 82 Portion 3 is currently under the land claims program in terms of the Restitution of Land Rights Act 1994 ..."
- 5.3. Does this letter contain a decision, and if so, is it a decision against which the Applicant may appeal?
- 5.4. A person who is required or wishes to obtain a licence to use water must in terms of section 40 of the NWA apply to the relevant responsible authority for a licence. Section 41 deals with the procedure for this application, such as the type of form to be used, the information to be submitted, the type of investigation to be done, how and by whom, the inviting of information on the application and asking for objections on the application.
- 5.5. The Applicant applied for a licence in terms of section 40 of the NWA and section 41 applies to this application. The Department, as the responsible authority, received the application and then decided not to process it, as the property, according to them, is subject to a land claims program and they informed the Applicant accordingly by a letter dated 27 November 2010.
- 5.6. According to the Water Tribunal this is a decision and the decision is due to an application for a licence.


- 5.7. Is this decision lawful, reasonable and procedurally fair as contemplated in section 33 of the Constitution of the Republic of South Africa of 1996? It would be if the Department has the authority by law to make a decision not to process the licence, because of the reason given, without applying the provisions of law, including the NWA, to the application.
- 5.8. The Water Tribunal is of the opinion that it has no jurisdiction to give a ruling on this. It is the responsibility of other institutions, such as the High Court. (See for example section 6, read with section 1 “court” and “tribunal” of the Promotion of Administrative Justice Act 3 of 2000. The Water Tribunal is not a tribunal as contemplated in section 1 “tribunal”). The Water Tribunal may only decide whether the hearing should proceed or not after considering the matter.
- 5.8.1. If the Tribunal is requested to give a ruling on the lawfulness of the decision, and that is the only matter to be dealt with by the Tribunal, the Tribunal should inform the parties that it has no jurisdiction regarding that and end the hearing.
- 5.8.2. If the Tribunal is requested to deal with the merits of the decision and questions regarding the lawfulness are also asked, the Tribunal should consider making a ruling on the merits of the decision and not on the lawfulness of the decision. The fact that the decision might not be lawful could help the Water Tribunal to clarify the matter, why there is an appeal, what aspects should be taken into consideration and how to address them, and it could also assist the Water Tribunal in making its decision on the merits of the matter.
- 5.9. In deciding to grant condonation, it is, therefore, not necessary for the Water Tribunal to decide on whether the decision is lawful, reasonable or procedurally fair. The Water Tribunal only has to decide whether a decision has been made, an appeal has been lodged against the decision not on time, and whether condonation should be granted for lodging the appeal not on time.
- 5.10. The Water Tribunal is of the opinion that a decision has been taken due to a licence application while dealing with it as required under the NWA. The Water Tribunal is satisfied that the Applicant may lodge an appeal against this decision with it and that the Applicant has done that in terms of section 148(1)(f) of the NWA. The appeal is contained in the documents signed by him dated 21 January 2011.
- 5.11. An appeal must in terms of section 148(3)(b) of the NWA commence within 30 days after notice of the decision was sent to the appellant concerned. The appeal lodged is about a month late.

- 5.12. The fact that the Respondent does not oppose the condonation does not mean that condonation should be granted as a mere formality. The Water Tribunal must still decide whether there is a good reason for condonation as contemplated in item 5(2) of part 2 of Schedule 6 to the NWA.
- 5.13. According to the Water Tribunal the following should be addressed in determining whether there is a good reason to grant condonation for the late lodging of the appeal: the degree of lateness; the explanation for the delay; the prospects of success in the matter; and whether there is prejudice to the other parties to the matter. (See for example *Melane v Santam Insurance Co Ltd* 1962 4 SA 531 (A)).
- 5.14. As far as the degree of lateness is concerned, both parties stated that it is not severe and the Water Tribunal agrees with that. The Water Tribunal is also satisfied with the explanation given by the Applicant for the delay. The Respondent did not indicate that he would suffer any prejudice, if condonation is granted. Due to this, it is according to the Water Tribunal not necessary for the Applicant to indicate a strong case of success for the Tribunal to grant condonation.
- 5.15. The merits of the case was not really discussed, probably because the letter dated 27 November 2010 referred to the wrong property. The Water Tribunal can, therefore, not determine the success of the appeal and whether the matter is shaky as stated by the Respondent. The Tribunal is however of the opinion that the Applicant must have the opportunity to state his case so that the Tribunal could decide on the merits of the decision.

6. DECISION

- 6.1. After the Water Tribunal has considered all the relevant information, it is satisfied that there is a good reason to grant condonation for the late lodging of the appeal by the Applicant. In the result, the Water Tribunal
- 6.1.1. grants the Applicant condonation for the late lodging of the appeal against the decision on the application for a licence to use water on Portion 3 of the farm Draaihoek 82; and
- 6.1.2. directs the Registrar of the Tribunal to schedule the matter for the hearing on the merits thereof.

Dated at Pretoria on this ²¹..... day of July 2011.


 H. Thompson