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

REF: WT 26/11/2010

In the two applications for condonation between:

PIETER CAREL BECKER	**APPLICANT**
and	
THE DEPARTMENT OF WATER AFFAIRS	**1ST RESPONDENT**
BLUE DOT PROPERTIES 352 (PTY) LTD	**2ND RESPONDENT**

CONDONATION RULINGS: 24 JUNE 2011

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1. APPEARANCES, REPRESENTATION 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	:	Adv. M M Oosthuizen SC, instructed by Martin Grütter Attorney of Lyttelton, Pretoria
For the 1st Respondent:		Mr. T Mashala, legal officer from the Directorate Legal Services of the Department of Water Affairs
For the 2nd Respondent:		Adv. D H Wijnbeek, instructed by Botha Senekal Inc Attorneys from Viljoenskroon

1.1. This is a unanimous ruling in the two applications for condonation heard on 24 June 2011 at the Protea Hotel Capital in Pretoria.

1.2. The Water Tribunal decided in terms of Rule 10 of the Water Tribunal Rules to hear the two applications together, as when the proceedings started, it appeared to the Tribunal that some common questions of fact and law would arise during the

hearings and it was practical and appropriate to proceed to hear the applications together. The Applicant and the two Respondents agreed before the decision was taken that the applications could be heard together.

1.3. The proceeding was recorded mechanically on 4 audio tapes.

2. ISSUE TO BE DECIDED

2.1. The question to be answered was whether there is a good reason to condone the late lodging of the appeals by the Applicant against the two decisions of the 1st Respondent dated 6 November 2007 and 15 November 2007 respectively.

3. BACKGROUND TO THE ISSUE

3.1. The farm Kromdraai 1727RD was previously owned by Mr J H de Jager. When Mr De Jager was sequestrated, Blue Dot Properties 352 (Pty) Ltd bought this farm.

3.2. Mr De Jager constructed the Morgenroodt Dam in the Holspruit, for irrigation purposes on the farm Kromdraai. The dam is situated on the farms Morgenrood 1733, Morgenrood C1329, Donum 794 and Vogelpan 1715.

3.3. Mr De Jager leased the adjacent farm Heeltevreden 1728RD from a Ms Scribante. Some of the irrigation from the Morgenroodt Dam also took place on the farm Welgelegen 1729RD, and probably also on Heeltevreden 1728RD. The extent and the manner thereof are not clear to the Water Tribunal.

3.4. The Head of the Gauteng Region of the Department of Water Affairs informed the Applicant that the responsible authority in terms of the provisions of section 35(4) of the National Water Act 36 of 1998 (NWA) determined the extent and lawfulness of the water uses on the Applicant's properties as follows:

3.4.1. By letter dated 6 November 2007 for the farm Welgelegen 1729RD, Registration Division Harrismith: The extent of the existing lawful water use as contemplated in section 32(1) of the NWA is 0 m^3 per year in respect of taking water from the Holspruit.

3.4.2. By letter dated 15 November 2007 for the farm Heeltevreden 1728RD, Registration Division Harrismith: The extent of the existing lawful water use as contemplated in section 32(1) of the NWA is 0 m^3 per year in respect of taking water from the Holspruit.

3.5. The reason given by the Responsible Authority for both these decisions is that the properties concerned are not riparian properties to the Holspruit.

3.6. The Applicant appealed against these decisions in terms of section 148(1)(e) of the NWA to the Water Tribunal and the appeal notice, which deals with both the

decisions together, was lodged with the Registrar of the Tribunal on 24 November 2010.

3.7. According to section 148(3)(b) an appeal must commence within 30 days after notice of the decision was sent to the appellant concerned. Therefore both the appeals were some 35 months late.

3.8. The Applicant applied in terms of item 5(2) of Schedule 6 to the NWA, read with the provisions of rule 4(4) of the Rules to the Water Tribunal for the condonation of the late lodging of the appeal.

3.9. The Applicant cited the 2nd Respondent in its capacity as the registered owner of the farm Kromdraai, as he might have an interest in the appeals. The Applicant and the 2nd Respondent might both claim an entitlement to the same water contained in the Morgenroodt Dam.

4. SURVEY OF EVIDENCE AND ARGUMENTS

Evidence and documents submitted

4.1. No oral evidence was adduced. The Applicant and Respondents made oral submissions through their respective representatives.

4.2. The Applicant submitted a document called "Head of Argument for Appellant", together with a bundle of documents numbered 1 to 17 and the Purchase agreement for the properties concerned, to the Tribunal at the start of his submission and used it in support of the application.

4.3. The 2nd Respondent submitted a document called "Second Respondent's Head of Argument opposing condonation", together with abstracts of the Irrigation and Conservation of Water Act 8 of 1912, the Water Act 54 of 1956 and the decision "*De Villiers and Another v Barnard and Another* 1958(3) SA 167(A) p 167, 187 and 188", to the Tribunal at the start of his submission and used it in support of the application.

4.4. 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 Applicant and also argued

4.5. The Applicant requested the Tribunal to-

4.5.1. grant the Applicant condonation for the late lodging of the appeal; and

4.5.2. direct the Registrar of the Tribunal to reschedule the matter for the hearing on the merits thereof.

4.6. A previous legal representative of the Applicant timeously commenced an appeal against both the decisions concerned by or before 5 December 2007.

4.7. The reason for that appeal, according to the Applicant, is that Mr De Jager constructed the Morgenroodt Dam in the Holspruit, for irrigation purposes. ... There is an agreement between Mr De Jager and the Applicant "that ... [the Applicant] would have the option to acquire ... [the] water rights [of Mr De Jager] should he stop using the water and ... [the Applicant] purchased the water rights when ... [Mr De Jager] stopped farming. Apparently the Department of Water Affairs ... was not aware of this and did not take this agreement and purchase into consideration when they evaluated ... the existing lawful water use. ...[The Applicant] will furnish the Tribunal with detailed submission including the relevant documentary proof as soon as it is compiled in a satisfactory format."

4.8. The Registrar did not acknowledge receipt of this appeal. The reason for this is not clear, but it could have been due to certain administrative capacity or other problems with the Tribunal and due to that, the Tribunal either did not receive the original letter or process the matter.

4.9. The legal representative of the Applicant passed away during May 2010 and the Applicant instructed a new legal representative to represent him further in the matter.

4.10. The new legal representative perused the file and provided the Applicant with a summary of events dated 2 June 2010 (in which he assumed, incorrectly as it turned out, that the properties concerned were not riparian land to the Holspruit) and suggested that certain investigations be done in order to find an alternative for the dilemma. Such investigation was then conducted which included opinions from two experts employed by the Appellant.

4.11. During the investigation the legal representative was alerted to the following:

4.11.1. The possibility that both the farms Welgelegen and Heeltevreden may be riparian land;

4.11.2. The fact whether the Applicant enjoyed a lawful existing water use or not, was not only dependent on the riparian status of the land but also on the lawfulness of, and the reliability of water delivery from, the Morgenroodt Dam.

4.12. On or about 13 October 2010 the Applicant was provided with a written report from the legal representative with the recommendation that appeals against the said two decisions should be lodged to the Tribunal.

4.13. After due consideration, it was concluded that it would be practical to rather launch fresh appeals than to try and determine the historical fate and details of the

procedure in respect of the appeals as originally commenced. In the result, the appeals in question, together with a substantive application for condonation, was launched on 24 November 2010.

4.14. The Applicant agrees that with the new appeals there is a serious delay with launching the appeals, but they submit that it should be taken into consideration that the first notice of appeal was sent off in time, and in a sense, the current appeals, although launched afresh, can be regarded as a continuation of the original appeals, especially if one keeps in mind that in terms of rule 3(2) of the Water Tribunal Rules the grounds of the appeal may be amplified at any time prior to or during the course of the appeal.

Regarding an explanation for the delay

4.15. The period between December 2007 and May 2010 was clearly occasioned by two factors: The fact that the Tribunal for some or other reason did not receive the original appeals or process it, and the fact that the previous legal representative of the Applicant did not follow up on the progress of those appeals.

4.16. The reasons for the delay between May 2010 and November 2010 are clear.

4.16.1. Firstly the matter had to be investigated thoroughly, taking into consideration the background and the history of the matter.

4.16.2. Secondly, the investigation of necessity entailed much more than merely an investigation into the riparian status of the properties concerned, which was initially assumed to be non-riparian, but incorrectly so.

4.16.3. Thirdly, the investigation required the instruction and involvement of at least two experts.

4.16.4. Fourthly, the investigation was complicated not only by the uncertainties concerning the historical use of the water, but also by the impact of the Morgenroodt Dam on this issue as well as the legal complexities.

4.17. The Applicant should therefore not be blamed for any delay. In respect for the period December 2007 to May 2010 he trusted his previous legal representative. In respect of the period thereafter he was dependent on a professional team assisting him.

Regarding the prospects of success

4.18. There is documentation in the Registrar's bundle indicating that irrigation took place on the farms Welgelegen and Heeltevreden with water from the Morgenroodt Dam during the two year period before the NWA commenced. And as these were attached to the 2nd Respondent's papers, he clearly accepts the

reliability of the contents thereof. (See p 37 to 39, 41 and 43 to 48 of the Bundle of the Registrar).

4.19. From the documentation it appeared that the only reason for concluding that no existing lawful water use as contemplated in section 32(1) of the NWA is applicable was that the properties concerned were not riparian land as contemplated in section 1 "riparian land" of the repealed Water Act 54 of 1956. However, according to the Applicant the two properties are riparian to the Holspruit, as the two properties are subdivisions of an original grant, namely Kafferstad no 168. (See p 7 to 10 of the Bundle of the Registrar).

4.20. For a water use to be an existing lawful water use as contemplated in section 32 of the NWA, it should have taken place at any time during a period of two years immediately before the date of commencement of the NWA and it should have been authorised by a law which was then in force. As water was used on the two properties concerned, which are riparian to the Holspruit, during the 2 year before the NWA commenced, these uses should be existing lawful water uses as stipulated.

4.21. As the proceedings before the Tribunal is in nature of a rehearing, the prospect of success can still be demonstrated at the hearing itself.

4.22. On a question from the Tribunal on how the Tribunal should deal with the fact that the relief looked for by the Applicant relates probably to the same water that might apply to an existing lawful water use applicable to the farm Kromdraai and whether the Tribunal should make a ruling on the exact quantity of water regarding the two properties concerned, if condonation is granted, and what would be the implications thereof, the Applicant answered that he had not thought that through. However, it might be that the relief sought is probably not to deal with the exact quantity of water involved, but to get a ruling on the decision taken on the verification of the water use.

Regarding whether there is prejudice to any one

4.23. There is no claim or even an allegation of any prejudice suffered by the 2nd Respondent because of the delay in commencing with the appeals.

4.24. Claims by the 2nd Respondent during presenting his case that he is suffering prejudice in that he is hamstrung in the development of its properties, despite him being the holder of valid water rights, and that the Applicant has since 2003 succeeded in frustrating its development, the Applicant responded that prejudice should deal with aspects on whether the Respondent is worse off procedurally due to the delay caused by the late lodging of the appeal than he would have had if the appeals were not lodged late.

4.25. If condonation is not granted, the Applicant would be prejudiced in that the Tribunal is the only institution which can bring out a final verdict on the merits of

the appeals. The Courts of law are only entrusted with questions of law arising under the NWA and with powers to review proceeding under the NWA.

Other matters

4.26. The matter is important to the Applicant as water is the lifeblood of any commercial farmer and in this case it is about the survival of a whole farm and all of its employees.

4.27. The Applicant stated that the history of the matter shows that he acted in good faith at all relevant times and that there is no grounds and no proper foundation for any inference of *mala fides* on the part of the Applicant.

Arguments by the 2nd Respondent

4.28. The Applicant does not rely on its alleged application of 5 December 2007, but on a new appeal on different grounds dated 24 November 2010. According to the 2nd Respondent, the Applicant approached the Tribunal with two irreconcilable versions:

4.28.1. In the first as lodged on 5 December 2007, the Applicant relied on water rights that he allegedly purchased from a Mr De Jager. The Applicant promised to furnish a detailed submission to the Tribunal, inclusive of "all the relevant documentary proof as soon as it is compiled in a satisfactory format." The latter never happened.

4.28.2. The second as lodged on 24 November 2010, premises on an alleged Surveyor-General's diagram dated 24 November 1914, and according to this, the farms Welgelegen and Heeltevreden are subdivisions of an original farm which is riparian to the Holspruit.

4.28.3. If the Applicant's conduct is *mala fide* and the Tribunal is convinced that he has no belief in the justice of his case, but is merely alleging a defence to delay the enforcement of the claim, he is naturally not entitled to any relief.

Regarding the first version, water rights bought from Mr De Jager

4.29. The Applicant alleges that he had a first option to acquire Mr De Jager's water rights when the latter stopped farming.

4.30. Mr De Jager was sequestrated and the 2nd Respondent bought Mr De Jager's property (Kromdraai) with water rights. Mr De Jager was however in no position to sell water rights as his estate vested in the Trustee of his estate.

4.31. The Applicant did not state when exactly and for what amount he purchased Mr De Jager's water rights.

4.32. The effect of sequestration of an estate of an insolvent is to divest the insolvent of his estate and to vest it in the Trustee. Once Mr De Jager stopped farming, he was in no position to sell the water rights.

4.33. The debtor may not make a contract which purports to dispose of any property of his insolvent estate. To have sold the water rights would thus have been precluded even if Mr De Jager purported to sell his rights.

4.34. Should the Applicant's version be that the contract was not completed by the insolvent (at the time he stopped farming), the Trustee generally has an election to perform in terms of the contract. The question whether the Trustee has elected to abide by the contract is one of fact, and not law. The sequestration, other than the evidence of the 2nd Respondent, is not dealt with. The Applicant failed to deal with Mr De Jager's insolvency.

4.35. The 2nd Respondent bought the farm Kromdraai with its rights.

Regarding the second version, water rights premised on an undivided farm in 1914

4.36. The Applicant failed to bring himself within the ambit of the Water Act 54 of 1956.

4.36.1. The two properties were held under separate titles at the commencement of the Act, 12 June 1956.

4.36.2. The owner of any subdivision of land referred to in section 1 "riparian" of the Act is entitled to such a share of the water of a public stream to which the owner of the original piece of land of which the sub-division formed a part was entitled immediately prior to the sub-division of such land, as may be agreed upon by the owners concerned or apportioned by the water court. The Applicant failed to refer to any agreement or decision of the water court to bring him within the ambit of the Act.

4.36.3. The Applicant's farms had no rights, water was pumped via Kromdraai and only when agri-rotation so allowed.

4.37. The rights to water associated with a sub-division of land were limited in the Irrigation and Conservation of Waters Act 8 of 1912.

4.37.1. According to section 2 (the definition of "riparian land), a subdivision, even if the public stream did not flow through or along the boundary of the subdivision, was entitled to such share of the water to which the undivided land was entitled as the parties or the water court decided and apportioned.

4.37.2. This definition specifically stated that nothing in the definition should have been construed as rendering riparian any piece of land which, being at the commencement of the Act (27 May 1912) a sub-division of land, was then non-riparian.

4.37.3. The subdivisions were in place, but the Applicant failed to allege any agreement or order of the water court that entitled the subdivisions to water.

4.38. The Applicant failed to bring himself within the ambit of the National Water Act 36 of 1998.

4.38.1. The Applicant did not indicate that he had an existing lawful water use as contemplated in section 32 of the Act which has taken place at any time during a period of two years immediately before the date of commencement (1 October 1998) of the Act.

4.38.2. In June 2007 the Department of Water Affairs founded that the 2nd Respondent irrigated 120 hectare during the qualifying period (the period of two years immediately before the date of commencement of the Act). There was no appeal against this.

4.38.3. In July 2007 the Department recommended that no convincing reasons could be found on any of the Applicant's properties to declare the irrigation development as existing lawful water uses.

Regarding prospect of success

4.39. There is no evidence or submission that the water was used on any of the sub-divisions at the commencement dates of the 1912 and 1956 Acts. It would be ridiculous to bring the Applicant's farms on the same basis as that of the 2nd Respondent, or alternatively it would introduce a principle foreign to our law. (See *De Villiers v Barnard* 1958(3) SA 167 (AD) at 187H –188A.)

4.40. The applicant only bought the properties concerned in October 2003 and therefore he could not be a party to any agreements in accordance with the 1912 and 1956 Acts.

4.41. There is no merit or *bona fide* version to entertain the appeal hearing based on the ground that the land was subdivided and recorded by 1914.

4.42. The 2nd Respondent argued that there would be no point in granting condonation as there is no prospect of success on the appeal or that the prospect of success is so remote as to be unappreciable.

4.43. Where the applicant relies upon the ineptitude and remissness of his own legal representative, and his explanation leaves much to be desired, condonation should be granted only if the prospects of success are strong. And in this case the Applicant failed to deal with the prospects of success and that there are no prospects of success on any of the grounds of the appeals submitted on 5 December 2007 and 24 November 2010.

Regarding the degree of lateness of the appeals and the explanation of the delay

4.44. The appeals of 5 December 2007 and 24 November 2010 could not be reconciled. The probable deduction is that the Applicant abandoned the first so-called appeals and pursued with the second appeals.

4.45. A long delay to submit an appeal should not be condoned if it is clear that the Applicant had no throughout desire to prosecute the appeal. The 2nd Respondent is of the opinion that Applicant did not throughout prosecute the alleged appeals.

4.46. In a letter addressed to the BKB Louwid Auctioneers dated 20 January 2009 the Applicant's previous legal representative threatened with an interdict, but eventually abided by the conditions of the sale. The deduction is that the Applicant did not throughout prosecute the alleged appeals.

4.47. The Applicant failed to provide a real explanation for the delay for the period December 2007 to May 2010 as well as the period after May 2010 until the appeals were lodged.

4.48. The 2nd Respondent submitted that the delay is unreasonable and the late lodging of the appeals should not be condoned.

Regarding prejudice

4.49. The 2nd Respondent argued that he is hamstrung in the development of his property despite being the holder of valid water rights.

4.50. The Applicant and the 2nd Respondent claim rights to the same source of water. To grant condonation will effectively divest and deprive the 2nd Respondent from his rights.

4.51. On a question from the Tribunal whether any document has been issued under the NWA stating what the entitlement is attached to Kromdraai, the 2nd Respondent referred to the Registration certificate issued in respect of the property and a departmental document from the Chief Industrial Technician addressed to the Acting Regional Head: Gauteng dated 15 June 2007. (See p 25 to 31 and 37 to 39 of the Bundle of the Registrar).

4.52. This application for condonation is a further delay and the matter has to come to finality. The Applicant has since 2003 succeeded in frustrating the 2nd Respondent in the development of Kromdraai.

Other matters

4.53. The 2nd Respondent stated that the appeals of 5 December 2007 were not in the prescribe format.

4.54. The 2nd Respondent also stated that the Applicant attacked the reasoning of the decisions, in that the properties are not riparian to the Holspruit, and not the rulings. According to the 2nd Respondent the reasoning is correct.

4.54.1. The subdivisions were already in place as far as back as 1914.

4.54.2. There is no agreement either before the commencement of the 1912 Act or the 1956 Act that entitled the subdivision to water.

4.54.3. There is no reliance on any actual use of water prior to the enactment of the 1912 and 1956 Acts and neither is there a case for lawful water use 2 years prior to 1 October 1998. Although it is mentioned that there was irrigation on the farms in 1998, the 2nd Respondent stated that the water was pumped via the farm Kromdraai and only to Heeltevreden when practices of rotation necessitated it that the land (or parts) on Kromdraai rests for certain crops.

4.55. The 2nd Respondent also stated that, on the premises that the Tribunal is inclined to consider costs, he is to be entitled to cost.

Contents of the documents submitted by the 1st Respondent and also argued

4.56. The 1st Respondent opposed the application for condonation.

4.57. The letter of the appeals of 5 December 2007 was not dated and the Water Tribunal did not acknowledge receipt thereof.

4.58. The appeals of 5 December 2007 were not submitted in the prescribed format as required by Appendix A of the Water Tribunal Rules. The Tribunal should therefore decline to consider the appeals.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

5.1. 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 commences in terms of item 5(1) of Part 2 of Schedule 6 to the NWA by serving a

copy of a written notice of appeal on the relevant responsible authority and lodging the original with the Water Tribunal.

5.2. No evidence or arguments were provided whether a written notice of the appeals was served on the relevant responsible authority during December 2007, namely the Head of the Gauteng Region of the Department of Water Affairs. The Applicant submitted evidence that the appeals were lodged with the Tribunal by way of a registered letter posted to the Registrar of the Water Tribunal on 5 December 2007. The letters containing the decisions against which the appeals were lodged are dated 6 November 2007 and 15 November 2007 respectively. It is not clear when these letters were sent to the Applicant. Rule 4(3) of the Water Tribunal are not of much assistance to determine when the decisions were sent, as the rule only states "Where the responsible authority has notified a person of a decision by means of a written document, the date of the document shall be deemed to be the date on which that decision was given."

5.3. These appeals were not in the format prescribed by Annexure A to the Water Tribunal Rules. It does not mean that the appeals should not be allowed. The Tribunal only has the power in terms if rule 3(4) to decline to consider the appeals.

5.4. Based on this, the Water Tribunal cannot, and has not, determined whether the letter of the Applicant posted to the Registrar dated 5 December 2007 are appeals as contemplated in section 148(1)(e) of the NWA and sent and lodged in time.

5.5. But, one can deduct from this that the Applicant had the intention to commence with the appeals within 30 days after the notices of the decisions were sent to him. If the appeals were in the correct format, served and lodged correctly and also processed as required by the NWA, then there would have been no need for the condonation applications.

5.6. This does not mean that condonation for the late lodging of the appeals dated 24 November 2010 should be granted without further investigation. Condonation could by no means be a mere formality. To grant condonation, there should be a good reason for the late lodging of the appeals as contemplated in item 5(2) of Part 2 of Schedule 6 to the NWA. The registered letter posted to the Registrar of the Water Tribunal on 5 December 2007 is only one of the many factors that should be considered to determine whether there is a good reason.

5.7. The Tribunal has to exercise a discretion after considering all the facts and in a manner that is fair to both sides and each case should be dealt with on its own merits. In exercising the discretion in this case, the Tribunal has taken into account all the cases referred to by the different legal representatives of the parties that deal with condonation together with the evidence and documentation submitted by them and their arguments. The Tribunal is of the opinion that in this case the following criteria should at least be addressed in determining whether there is a good reason to grant condonation for the late lodging of the appeals:

5.7.1. The degree of lateness;

5.7.2. The explanation for the delay;

5.7.3. The prospects of success in the matter; and

5.7.4. Whether there is prejudice to the other parties to the matter.

(See among others *Melane v Santam Insurance Co Ltd* 1962 4 SA 531 (A) at 532C-F, *Chetty v Law Society (Tvl)* 1985 2 SA 756 (A), *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (OPD) at 475, *Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 AD at 634H-I, *Meintjies v HD Combrink (Edms) Bpk* 1961 (1) SA 262 (A) at 264A, *Breytenbach* v *De Villiers*, NO en Andere 1961 (2) SA 542 (TPA) and *Salojee & Another NN v Minister of Community Development* 1965 (2) SA 135 (A) at 141C.)

Regarding the degree of lateness

5.8. The Tribunal is of the opinion that the delay of some 35 months is serious. Therefore, before condonation could be considered at all, at least a reasonable explanation for the delay should be given

Regarding the explanation for the delay

5.9. The Tribunal is satisfied with the explanation given by the Applicant regarding the period between May 2010 and November 2010, in spite thereof that it is 6 months. During this period the Applicant and his expert team had to investigate the matter afresh and thoroughly and not whether or not to lodge appeals or to revive the previous lodged appeals. It was also complicated by the historical use of the water and the legal complexities associated with the water use, including the status of the Morgenroodt Dam.

5.10. As far as the period December 2007 to May 2010 is concerned, the Tribunal struggled to decide whether there is a reasonable explanation for this delay. According to the Applicant there is no information available on, for example, whether and how the legal representative of the Applicant followed the matter up with the Tribunal during this period, as since the lodging of the appeal on 5 December 2007, a period of about 29 months lapsed. Did the Applicant follow the matter up with his legal representative, and if so how and when? An affidavit from the Applicant could have been of great help here.

5.11. The 2nd Respondent, on the other hand, made some reference to the appeal during the time when he auctioned his property. A letter from the previous legal representative dated 20 January 2009 to the Auctioneer referred to the appeal but this is no indication that there was a throughout desire from the Applicant to prosecute the appeals. It might be an indication that at time the Applicant had no intention to abandon the appeals

5.12. However, the Tribunal has to acknowledge the fact that the Applicant has lodged appeals on 5 December 2007, although many questions could be asked regarding this. The Tribunal has also taken into account that the Applicant decided rather to launch fresh appeals than to try and determine the fate and details of the appeals lodged 5 December 2007.

5.13. The Applicant also stated "that one should also take into consideration that the first Notice of Appeal was sent off in time – in a sense the current appeal, although launched afresh, can be regarded as a continuation of the original appeal, especially if we keep in mind that in terms of rule 3(2) of the Water Tribunal Rules the grounds of appeal may be amplified at any time prior to or during the course of the appeal".

5.14. The 2nd Respondent argued that due to launch of the second appeals on 24 December 2007 there could be a deduction that the Applicant abandoned the appeals of 5 December 2007, as they could not be reconciled. Whether or not they could be reconciled is irrelevant to this case as pointed out below and the Tribunal is also satisfied with the reason why new appeals were lodged and not to try to continue with the first appeals.

5.15. Although the Tribunal is not satisfied with explanation given for the delay for the period December 2007 to May 2010, the Tribunal will still grant the necessary condonation, provided that, firstly, none of the two Respondents would suffer real prejudice due to the condonation, and secondly, there is at least some possibility of success based on the facts and arguments submitted. The reason for this is as follows:

5.15.1. The Applicant lodged an appeal on 5 December 2007. Although many questions could be asked regarding the legality regarding these appeals, at least it is clear that the Applicant, at that time, had the intention to commence with the appeals within the prescribed time period.

5.15.2. An appeal takes in terms of item 6(2) of Part 2 of Schedule 6 to the NWA the form of a rehearing. The Tribunal may receive evidence, and must give the parties involved an opportunity to present the case. The grounds of the appeal may in terms of Rule 3(2) of the Water Tribunal Rules be amplified at any time prior to or during the course of the hearing. According to the Tribunal it means that this should not result in that a new case is brought to the Tribunal, but that new facts or arguments may be brought to the Tribunal regarding the original case. The new facts and arguments need not to be reconcilable with the old. If not reconcilable, that could be questioned and tested during the hearing.

5.15.3. Although the reason given by the Applicant in the appeals lodged on 5 December 2007 varies from the reason given in the appeals lodged 24 November 2007, it still deals with the same decisions, and is therefore still the same case, namely the decisions taken by the responsible

authority as contained in the letters dated 6 November 2007 and 15 December 2007.

5.15.4. The run of the matter was probably not always controllable by the Applicant. He relied on the competence and ability of his previous legal representative during the period December 2007 to May 2010. It is not clear and was also not argued whether during this period the previous legal representative was inept or remiss with the matter or whether there was any lack of diligence on his side or that he erred in the matter.

5.16. The 2nd Respondent argued that there should have been a throughout desire to prosecute the appeal. The Tribunal is of the opinion that it is not necessary in this case.

Regarding the prospects of success in the appeal

5.17. The Tribunal understands that the matter might be complex, with a history and probably also some other implications once a decision is taken on the merits of the case (for example how would it affect the exercising of the entitlement associated with the property of the 2nd Respondent and how should that be addressed?). It is due to this difficult to determine whether the Applicant has shown any strong prospect of success on the merits, which the 2nd Respondent argued should be the case.

5.18. When considering the matter, it does not mean that the Applicant should have shown exactly what relief is sought and what evidence and arguments will be presented during the hearing itself, if condonation is granted. As stated above, new facts and arguments could in terms of item 6(2) of Part 2 of Schedule 6 to the NWA and Rule 3(2) of the Water Tribunal Rules still be submitted at any time prior to or during the course of the hearing, provided it does not result in that a new case is brought to the Tribunal.

5.19. Notwithstanding this, the Tribunal is satisfied that the Applicant showed that there might be some prospects of success and the 2nd Respondent has not shown that there is no possibility of success.

5.19.1. The matter deals with the lawfulness and extent of the existing lawful water use as contemplated in section 32(1) of the NWA on the farms Welgelegen and Heeltevreden as verified by the responsible authority concerned.

5.19.2. The appeals are against decisions of the responsible authority on the verification of water use under section 35. That does not necessarily mean that the Tribunal should make a ruling on the exact quantity of water regarding the two properties. It should deal with the merits of the decisions.

5.19.3. For a water use to be an existing lawful water use, it should have taken place at any time during the period 1 October 1996 to 30 September 1998 (the two year period before the NWA commenced, also know as the "qualifying period") and it should have been authorised by or under any law which was in force on 30 September 1998.

5.19.3.1. From the documentation submitted, it appears that some irrigation took place on the properties concerned during the qualifying period.

5.19.3.2. During the hearing the Applicant and 2nd Respondent mainly argued whether the properties of the Applicant fall within the ambit of the water laws, namely are they riparian properties or not, and if, whether they are excluded from any water entitlement due to an agreement, order of a court or other means. It might be necessary to determine that, but they have not argued the real issue, namely whether the use on the properties could have been authorised by or under law in force on 30 September 1998 and whether it was the case, and by implications whether it could or should not have been authorised or have not been authorised.

5.19.3.3. From the documentation and arguments it appears that the properties concerned are subdivisions of the farm Kafferstad No 168, which might be an original grant as contemplated in section 1 "riparian land" of the repealed Water Act 54 of 1956. However, no documentation was submitted to show whether Kafferstad is indeed a riparian property.

5.19.3.4. The Applicant did not submit any documentation, such as an agreement or court order as contemplated in section 2 "riparian land" of the repealed Irrigation and Conservation of Waters Act 8 of 1912 or section 8 of the repealed Water Act 54 of 1956, showing that the properties concerned are entitled to water. But, even if such documents do exist, it does not mean that the properties are entitled to water of the Holspruit, and *vice versa*, even if there is no such documentation, it does not mean that the properties concerned are not entitled to such water.

5.19.3.5. The 2nd Respondent also did not submit any documentation, such as an agreement or court order, showing that properties concerned are not entitled to water.

5.19.3.6. Based on this, the Tribunal is of the opinion that the use of the water on the properties concerned could have been

authorised by or under any law which was in force on 30 September 1998.

5.20. Due to this, the Water Tribunal is of the opinion that the Applicant should have the opportunity to present his case to the Tribunal and the Respondents to respond to that so that the Tribunal could decide on the merits of the matter.

Regarding prejudice to any party

5.21. The 2nd Respondent argued that he is hamstrung in the development of his property despite being the holder of valid water rights. He and the Applicant claim rights to the same source of water. To grant condonation will effectively divest and deprive the 2nd Respondent from his rights.

5.22. The Tribunal has not evaluated the documentation the 2nd Respondent referred to so as to substantiate the entitlement of the 2nd Respondent's property. Even if there is an entitlement that relates to the property, that on its own should not prohibit the Tribunal to deal with the appeals lodged by the Applicant, if condonation is granted.

5.23. The Tribunal is of the opinion that the 2nd Respondent is not prejudiced by the appeals regarding the development of his properties. He may proceed with that, as while the appeals are dealt with, it will not place any restriction on the development. However, there might be a risk associated with this, especially if the appeals also deal with the same source of water that he relies on, namely the Morgenroodt Dam. Furthermore the legality of this dam might also be questionable.

5.24. It might even be that, if the matter is dealt with under appeals, that some of the uncertainties regarding the properties of the Applicant and 2nd Respondent are removed. But that would probably not be the end of the matter.

5.25. Nothing was presented to the Tribunal that indicate that either of the Respondents would be worse off procedurally due to the delay caused by the late lodging of the appeals than they would have had if the appeals were not lodged late, for example that certain documents could have got lost during the period of delay which will prejudice them in presenting his case.

5.26. By not granting the condonation, the Applicant is not necessarily prejudiced regarding the merits of the decisions as argued by him, as the decisions in respect of the Applicant's properties and the decision in respect of the Respondent's property could still be reviewed and set aside by the High Court. If the case, the responsible authority could then deal with the merits of the case again.

Other matters

5.27. Based on the facts submitted, it is not possible to determine whether the Applicant's conduct was *mala fide* and whether he did not act in good faith at all time. This aspect could therefore not play a role in deciding whether condonation should be granted or not.

5.28. The Tribunal has taken note of the importance of the case for the Applicant.

5.29. The 2nd Respondent also argued that the Applicant attacked the reasoning of the decision and not the decision self. Even if the reasoning of a decision is wrong, the decision might still be right, but then due to another reason. As an appeal to the Tribunal takes the form of a rehearing, new facts and arguments may be presented, and it is for the Applicant to decide whether he wants to attack only the decision itself, first the reason give for the decision and then the decision or the reason and decision together.

5.30. Regarding the request from the 2nd Respondent to consider costs, the Tribunal has no jurisdiction regarding that.

6. DECISION

6.1. After the Tribunal has considered all the relevant information, the Tribunal is satisfied that there is a good reason to grant condonation for the late lodging of the appeals by the Applicant. In the result, the Water Tribunal

6.1.1. grants the Applicant condonation for the late lodging of the appeals against the decisions on the verification of the water uses on

6.1.1.1. the farm Welgelegen 1729RD as contained in the letter of the Head of the Gauteng Region of the Department of Water Affairs dated 6 November 2007; and

6.1.1.2. the farm Heeltevreden 1728RD as contained in the letter of the Head of the Gauteng Region of the Department of Water Affairs dated 15 November 2007; 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