

**IN THE WATER TRIBUNAL**

**HELD AT PRETORIA**

**CASE NO. WT 07/08/2008**

In the appeal between:-

**SILVER CHARM INVESTMENTS 114 (Pty) Ltd**

**APPELLANT**

and

**DEPARTMENT OF WATER AFFAIRS &  
FORESTRY**

**FIRST RESPONDENT**

**CHIEF DIRECTOR: WATER USE**

**SECOND RESPONDENT**

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**APPEAL DECISION:**

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**APPEARANCES:**

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

For the Appellant : Adv. J. De Necker

For the Respondent : Mr. T. Mashala

- \* each party had a fair opportunity to present its case;
- \* as correctly conceded by **Mr. Mashala** for the respondents, there would be no prejudice to the respondents if condonation was granted because the respondents were ready to proceed with the appeal hearing as they were not even aware that the appeal was lodged late until that issue was raised by the Tribunal of own accord;
- \* both parties came prepared for the hearing with witnesses being readily available;
- \* the appellant showed that there existed a bona fide case which prima facie carries some prospects of success insofar as it averred that the application redresses the need as contemplated in section 27 (1) (b) of NWA and, in fact, intended to adduce evidence to that effect at the appeal hearing should condonation be granted.

The appeal hearing could, however, not commence in earnest due to time constraints and it resumed on the 13<sup>th</sup> May 2009.

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

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

The parties adduced oral evidence and submitted documents by mutual consent in addition to the bundle prepared by the Registrar of the Tribunal.

##### 4.1.1. **The appellant's case:**

Two(2) witnesses testified in support of the appeal to, inter alia, the effect that:-

- \* the appellant had established a Trust for the benefit of some 36 beneficiaries from previously disadvantaged communities;
- \* the said Trust was duly registered with the relevant office of the Master of the Supreme Court on the 26<sup>th</sup> March 2009;
- \* the respondents were notified of the appellant's activities aimed at redressing the result of past racial and gender discrimination well before the decision refusing the licence was made with a letter from Standard Bank confirming the said efforts having been presented to the second respondent;
- \* the Trust has held meetings and is operational;

- \* the Trust has not yet been allocated shares in the business of the appellant and this will only occur once the licence herein has been issued;
- \* the appellant has concluded an agreement for the surrender of entitlement to water uses with one Frik Geysers and his wife.

**4.1.2. The respondents' version:**

On their part, the respondents tendered the evidence of the Deputy Director: Administration in the Water Allocation section of the first respondent to, inter alia, the effect that:

- \* the appellant was given ample opportunity to submit documents showing that the application satisfied the redress need;
- \* the decision was based on available information;
- \* the application does not satisfy the 7 (seven) elements of empowerment set out in the AGRIBEE Sector Charter insofar as ownership and management control, among others, were not addressed;
- \* the first respondent does not have a water charter and relies on charters applicable in the sector in which the appellant trades or conducts business.

**4.2. Argument:**

**A. The appellant's submissions:**

**Mr. De Necker** submitted to the following effect, among others:

- (a) it is clear from available evidence that a BEE Trust has been registered and that the beneficiaries would benefit if the licence is granted;
- (b) it was, further, clear that the Trust is entitled to hold shares in the appellant's structure and business.

**B. The respondents' submissions:**

**Mr. Mashala** submitted to, inter alia, the following effect:

- (a) the Trust was not yet registered when the application was lodged and the decision was made;
- (b) the Deed of Trust should not be considered as evidence because it was only executed after the fact of the decision;
- (c) the Constitution of the Republic of South Africa is supreme law and the respondents were obliged to comply with it in as far as the redress requirements are concerned.

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

The dispute between the parties revolved around the question as to whether or not the granting of the water use licence in question will serve to redress the result of past racial and gender discrimination.

It was common cause between the parties that as at the date of the application and the decision, the Trust had not yet been established and / or registered.

It was, however, axiomatic that as at the date of the appeal hearing the Trust had been registered. The respondents, effectively, contended that the fact of the existence of such a Trust was simply irrelevant to the issue because it was not there at the time of the lodgement of the application and the making of the impugned decision.

The Tribunal was, however, of the view that it was obliged to hear and receive evidence which came to light after the fact of the application and the decision because the appeal was, in law, a rehearing of the matter (see item 6(3) of Schedule 6 of NWA and **CIR v Da Costa 1985(3) SA 768(A)** with regard to a rehearing of a matter on appeal by the Tax Court).

The Tribunal was not satisfied that the need for redressing the results of past racial and gender discrimination was in favour of the issuing of the licence herein regard being had to, inter alia, the following:-

- \* although it was clear that the appellant was in the process of empowering its previously disadvantaged employees and women through the registration of a Trust for their benefit, the said Trust had not yet acquired any shares in the appellant's structure or business as at the date of the appeal hearing;
- \* what is contemplated by the relevant provisions viz. section 27 (1) (b) of NWA is for the responsible authority, in the position of the respondents, to, where relevant, issue a general authorisation or licence if such issuance would redress the effect of past racial and gender discrimination;
- \* the result of such discrimination is, inter alia, the exclusion of blacks and women from lawful access to water resources;

- \* one of the objects of NWA is to attain or promote equitable distribution or access to water;
- \* in order to attain the foregoing objective the responsible authority should, therefore, issue a licence or general authorisation to people or entities that assist in the realisation of or the fulfilment of the said need wherever such a need may be relevant to an application which falls to be determined at any given time;
- \* the agricultural sector is still being transformed insofar as it has a Transformation Charter viz. AGRIBEE Sector Charter issued in terms of section 12 of Broad – Based Black Economic Empowerment Act, 2003;
- \* the need to redress the results of past racial and gender discrimination was, therefore, relevant to the appellant’s application.

In conclusion the Tribunal was of the view that the application was premature insofar as the empowerment programme had not yet been completed. The appellant should, however, be applauded and encouraged in the direction which it has taken. In the Tribunal’s considered view, the appellant shall be entitled to approach the respondent for the relevant licence once its empowerment programme has been completed.

**6. DECISION:**

- 6.1. In the premises the appeal fails; and
- 6.2. The file shall be closed.



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**Lepono Lekale  
(Chairperson)**