THE WATER TRIBUNAL

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Case Number: **WT05/22/MP**

In the Appeal between:

THE TRUSTEES FOR THE TIME BEING OF THE CORNEELS GREYLING TRUST	First Appellant
MOOIBANK BOERDERY (PTY) LTD (Formerly OKUTUMA FARMING (PTY) LTD)	Second Appellant
AND	
THE CHIEF DIRECTOR: WATER USE LICENSING MANAGEMENT, DEPARTMENT OF WATER AND SANITATION	First Respondent

KANGRA COAL (PTY) LTD	Second Respondent

Date of Hearing:	30 November 2023
Date of delivery of judgement:	19 April 2024
Chairperson of the Tribunal	Adv P. Loselo
Additional Member of the Tribunal:	Adv N. Lekgetho

JUDGEMENT

Introduction

1. On 22 September 2023, we issued a directive, which directed the appellants to apply for condonation for the late filing of their appeal, should they wish to do so.

2. On 5 October 2023, the appellants lodged their application for condonation, in terms of item 5(2) of Part 2 of Schedule 6 of the National Water Act, 1998 Act No. 36 of 1998 (*'the Act'*) for the late filling of its appeal.

3. The appellants contend that their appeal was not filled out of time but was timeously submitted in accordance with s 148(3)(c) of the Act. That the condonation application was filed out of abundance of caution in the event the Water Tribunal (*'the Tribunal'*) found that the appeal was filed out of time.

4. At the onset, the first respondent did not oppose the condonation application and it communicated its intention not to oppose by a letter addressed to the Registrar of the Tribunal dated 30 October 2023. In that letter the first respondent stated that:

> *"The Department is not intending to defend the Appeal and the merits of this matter. Based on this, the Department respectfully requests not file its Statement of Defence, attend the pretrial hearing and to file the pretrial hearing minutes..."*

5. However, on 29 November 2023, on the eve of the hearing of the condonation application, the first respondent filed its submission with the Registrar of the Tribunal opposing the condonation application.

6. On 30 November 2023, during the hearing of the application, the parties agreed not to oppose first respondent's late submission. In this regard the appellants and Kangra indicated that they were ready to proceed with the hearing and that they would reply to the first respondent's written submissions orally.

7. The Kangra maintains that upon proper interpretation of the relevant statutes there was no appeal filed by the appellants. The Kangra contended, in the alternative, that in the event that the Tribunal finds that the appeal was lodged by the appellants, then such an appeal was filed out of the time period within which an appeal ought to have been lodged.

Issues for determination

8. The Tribunal is called upon to determine (a) whether there is in fact an appeal lodged by the appellants; (b) and, if so, whether such appeal was lodged within the 30 days period after the notice of the decision and/or reasons for the decision was given; and (c) if the appeal was lodged out of time, whether there is good cause shown for condonation of the late filling of the appeal to be granted.

Background

9. The dispute between the parties stems from a water license use (*'WUL'*) granted to the second respondent *('Kangra')* in respect of its Balgarthen A Adit (*'the Adit')*, on 25 October 2021. The Kangra applied for a WUL in terms of s 40 of the Act on 6 June 2020.

10. Kangra operates an underground coal mine in the Kusipongo Mining Area in Mpumalanga. The appellants were informed, by Kangra's Attorneys on 3 December 2021, of the Balgarthen Adit WUL, by means of a letter on the same date.

11. It is common cause that the Kangra operates an underground coal mine near the appellants' properties and the mining takes place below the applicants' farms. As a result, the Kangra applied for the impugned WUL.

12. The Appellants objected to the issuing of the WUL, on the basis that the mining activities conducted by the Kangra pose a risk to the quality of water.

13. On 14 December 2021, the appellants' attorneys addressed a letter to the First Respondent, in terms of s 42 of the Act, asking for reasons for the decision to issue the WUL to Kangra. The letter required the first respondent to provide the reasons by 14 December 2022. The letter further stated that the Appellants will lodge an appeal within 30 days of receipt of the reasons for the decision.

14. It is common cause that the Appellants' letter of 14 December 2021, was not responded to. On 19 January 2022, the appellants' Attorneys, again requested the First Respondent to provide reasons by 24 January 2022. This request was also not responded to.

15. A similar request was made by means of a letter dated 13 April 2022. In that request, the appellants reiterated their intention to appeal against the decision to issue WUL to Kangra. Once again there was no response to the request.

16. Despite not having received reasons from the First Respondent, the appellants submit that they lodged an appeal with the Tribunal on 12 July 2022, and reserved their rights to supplement their appeal upon receipt of requested reasons.

17. It must be noted that from the records of the Tribunal the appeal was lodged on 14 July 2022 and the Registrar of the Tribunal acknowledged receipt thereof on 14 July 2022. It follows that the appeal was lodged on 14 July 2022.

18. On 21 July 2022, the Kangra informed the appellants that their appeal was lodged out of time, that there was no proper appeal lodged, and that the appeal did not have the

effect of suspending its WUL. Consequently, Kangra contends it is entitled to proceed with mining activities.

19. After a period of over 11 months from the date on which reasons were requested, the appellants eventually received reasons for the decision on 17 November 2022, from the Registrar. The appellants supplemented their grounds of appeal on 31 January 2023.

20. Around June 2023, the appellants noticed activities at the mine. This prompted them to send a letter to Kangra's attorneys on 30 June 2023, requesting Kangra to cease mining. They received no reply. They, in turn, deemed the mining activities by Kangra to be unlawful as they had lodged an appeal which had the effect of suspending Kangra's WUL.

21. On 14 July 2023, the appellants approached the High Court in the Gauteng Local Division on an urgent basis for an interdict to prevent the Kangra from conducting mining activities pending the determination of a condonation application and the appeal by the Tribunal.

22. On 11 August 2023, per Honourable Mr Justice WJ Du Plessis, the high court granted the urgent application, interdicting the Kangra from undertaking any water use in terms of s 21 of the Act, at the Adit until the suspension is lifted by the First Respondent or until the appellants' appeal is dismissed by the Tribunal.

23. The Appellants cite, as the grounds of appeal, among others, inadequate public participation, certain impacts not assessed, landlord consent not obtained and the

mining activities posing a risk of polluting the flow of water from 24 natural springs, from which the Appellants depends on to irrigate crops and use for livestock.

The law

24. Chapter 4 of the Act provides for water use under general authorisation, licensing or existing lawful water use. Part 7 of Chapter 4 of the Act provides for a procedure for applications for WUL. Section 42(b) places a duty on the responsible authority to promptly furnish reasons for its decisions relating WUL, amongst others.

25. Section 148(1)(f) provides for an appeal to the Tribunal subject to s 41(6), against a decision of a responsible authority on an application for a licence under section 41, or on any other person who has timeously lodged a written objection against the application. The provisions of s 41(6) are not relevant for the purposes of this application.

26. In term of s 148(2)(b) an appeal suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation, pending the disposal of the appeal, unless the Minister directs otherwise.

27. Section 148(3) and rule 4(1) of the Tribunal Rules states that:

> *'An appeal must be commenced within 30 days after—*
>
> *(a) publication of the decision in the Gazette;*
>
> *(b) notice of the decision is sent to the appellant; or*
>
> *(c) reasons for the decision are given,*

whichever occurs last.'

When must an appeal be commenced with

28. The Appellants correctly referred the Tribunal to the Tribunal's ruling in the matter between *Norsand Holdings (Pty) Ltd v Department of Water Affairs and Forestry and Another*, where it was held 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 or 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.'*

29. Essentially, the trigger event for the commencement or the period within which the appeal must be lodged is bifurcated. First, a person seeking to appeal a decision of the responsible authority can appeal upon the occurrence of any event listed in s148(3)(a)

or s148(3)(b). Thus, under any of the events listed under s148(3)(a) or s148(3)(b), the legislature anticipated that a person who seeks to appeal would have considered the information contained therein as sufficient for the purpose of lodging the appeal.

30. Second, that person may decide to request reasons for the decision in terms of s148(3)(c), before lodging the appeal. Under this subsection the appellant would not have been able to decide whether or not to appeal the decision without being furnished with reasons therefor.

31. However, the exercise of the options referred to above is dependent on which of the events occurred last. In other words, the last event to occur will trigger the commencement of the running of the period within which the appeal must be lodged.

32. It is common cause that the first respondent's decision was not published in the Gazette and that it was made known to the appellants by the Kangra's lawyers on 3 December 2021. Thus, the first respondent did not inform the appellants of his decision as required by law. In our view the obligation to lodge an appeal was not triggered by the notice of 3 December 2021. However, we accept that by conduct the appellants accepted that they knew about the first respondent's decision. This shall become clear later.

33. It is further common cause that the appellants did not lodge an appeal within 30 days from 3 December 2021, but requested reasons for the decision from the first respondent on 14 December 2021, 19 January 2022, and 13 April 2022, to no avail.

34. Paragraphs 6, 4 and 4 of the appellants' letters of 14 December 2021, 19 January 2022 and 13 April 2022,[1] requesting for reasons states that:

> *'Upon receiving the aforementioned reasons, our clients intend appealing against the decision to grant the WUL'.*

35. It is clear that the appellants had always intended to appeal after receiving reasons from the first respondent. This means the appellants opted to appeal after receiving reasons for the decision from the first respondent instead of invoking the provisions s148(3)(a) or s148(3)(b).

36. The appellants lodged their appeal on 14 July 2022 and were provided reasons for the decision to grant WUL on 17 November 2022. It therefore follows that their appeal was lodged four (4) months before reasons were given. It must follow, therefore, that the appeal was not lodged out of time. What happened is that the appellants appear to have given up on ever receiving the requested reasons for the decision.

37. Section 33(2) of the Constitution of the Republic of South Africa, 1996 (*'the Constitution'*), affords anyone whose rights have been adversely affected by an administrative action the right to be given written reasons for such action as follows:

> *'(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'.*

[1] *Letter of 14 December 2021, Annexure A, B & C of the Appellants' Application for Condonation, pg. 40-44.*

38. PAJA was enacted to give effect to s 33 of the Constitution. Section 1 of the PAJA defines decision as

> *"**decision**' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-*
>
> *(a) ...;*
>
> *(b) ...;*
>
> *(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
>
> *(d) ...;'*

39. PAJA further defines an administrative action as any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power or performing a public function in terms of any legislation. The issuing of a WUL by the first respondent is thus a decision as envisaged in PAJA.

40. Section 5(2) of PAJA requires that the administrator must furnish "adequate reasons" to the requester. In terms of PAJA, the first respondent is required to provide reasons to the Appellants.

41. Section 42(a) of the Act, which is also consistent with the provisions of PAJA with regard to the right to be provided with reasons, requires the responsible authority to, after reaching a decision on a licence application, promptly notify the applicant and any person who has objected to the application.

42. Section 42(b) of the Act states that the responsible authority must promptly, at the request of any person contemplated in paragraph (a) of s 42, give written reasons for his decision. This provision is peremptory.

43. It cannot be gainsaid that the provision of reasons is one of the fundamental constitutional rights to ensure administrators are kept accountable to the people they serve.

44. Common sense also dictates that the reasons given for a decision assist those affected by the decision to determine whether there is any legal basis to challenging such a decision.

45. The appellant referred to *Hoexter* on the importance of reasons[2] where the learned author stated that:

> *"... from the affected individuals point of view, reasons offer considerable procedural benefits. Indeed, the right to reason is often regarded as a crucial component of procedural fairness or natural justice, and the PAJA acknowledges this by requiring that affected individuals be informed of their right to reasons. Clearly, the decision whether and how to challenge an unfavorable administrative decision is far more sensibly made once reasons have been given for it. Reasons give someone something to work with, for example, in deciding whether an administrator has pursued improper purposes, taken irrelevant considerations into account, or made an error of law."*

[2] *Hoexter and Penfold, Administrative Law in South Africa, 3rd ed, 2021, para 8.2, pages 629-630.*

46. The High Court, per Du Plessis AJ, in *Trustees for the Time Being of the Corneels Greyling Trust and Another v Minister of Water and Sanitation*[3], ('*Greyling Trust*'), stated that:

> *'Reasons for an administrative decision such as this is important in the context of an appeal for two main reasons: Firstly, it allows an appellant to consider if it wants to challenge the decision. In other words, knowing the reasons may obviate the need for an appeal. Secondly, it allows the appellant to determine on what ground it will challenge the appeal'.*

47. The fact that the appellants lodged their appeal on 14 December 2022, whereas they knew of the decision as far back as 3 December 2021, is not without valid reasons. The appellants intended appealing the decision within 30 days of receipt of the reasons as contemplated in s 148(3)(c), which reasons were only provided after they had lodged their appeal. Thus, the 30 days period within which the appeal ought to have been lodged, in the context of this case, can only be reconned from the date on which reasons were provided. There was no obligation on the appellants to lodge their appeal within 30 days from the date on which they were notified of the decision as they opted to invoke s 148(3)(c).

48. Consequently, we find that the appellants dully lodged an appeal with the Tribunal and that such an appeal was lodged four months before reasons for the decision were provided. Thus, the 30 days period could not have and had not started running by the

[3] *High Court Judgement (2023 / 069111) [2023] ZAGPJHC 898 (11 August 2023), para 72*

time the appeal was lodged. The appeal was thus lodged before time and not out of time.

Is there an Appeal?

49. The Kangra argues that there was no appeal as none of the three events provided for in s 148(3) and rule (4)(1) of the Rules of the Tribunal had occurred. There was no publication of the decision or notification or provision of reasons, and that these events may still occur in the future, so the argument goes. This flies in the face of the Kangra's concession that their letter of 3 December 2021 to the appellants' attorneys had all the information necessary to lodge an appeal. By this, Kangra is implicitly conceding that the appellants were notified of the first respondent's decision and could then appeal *albeit* that the notification did not come from the first respondent.

50. Counsel for the Kangra further argued that the obligation under s 42 of the Act arises only if there is a request for reasons made by a person who was notified in terms of s 42(a). Further that, since the appellants were not notified in terms of that subsection, they were not entitled to reasons. We find difficulty with this argument.

51. Firstly, this would be at odds with the Constitution which provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

52. In Independent *Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others [2019] ZACC 47 paras 1-2*, per Mogoeng CJ, the Constitutional Court held that:

> *'[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.*
>
> *[2] The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that "when interpreting any legislation . . . every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights". Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.*
>
> *[3] ..."*

53. Recently the Constitutional Court, in *Lötter*[4], per Madlanga J, held that:

> *"... Second, courts must interpret legislation contextually. And "context" includes other provisions of the statute or the statute as a whole. In Hoban Howie JA held that an interpretative approach that says "context" "is confined to parts of a legislative provision which immediately precede and follow the particular passage under examination" is unacceptably narrow..."*[5]

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[4] *Minister of Water and Sanitation and others v Lötter NO and others and related matters 2023 (6) BCLR 763 (CC).*
[5] *para 33.*

54. It is inconceivable to suggest that the appellants were not entitled to written reasons for the decision, only because they were not notified of the decision by the first respondent.

55. Secondly, the argument that the first respondent did not notify the appellants is neither here nor there. The point is the appellants were notified of the decision, *albeit*, by the Kangra. What is important is the knowledge of the decision and not necessarily by whom the decision got to be known. To do otherwise, will in the context of this matter, emphasise form over substance and also to be overly technical. In any case the appellants have exercised their right to appeal based on the knowledge of the decision it received from Kangra. That should be sufficient.

56. As to the argument that the department provided the record of decision after the appeal had commenced, was done in compliance with Item 5 of Schedule 6 and not in terms of s 42, this flies in the face of our statutory canons of interpretation which are to the effect that legislation must be interpreted contextually as stated in the *Lotter* judgement. It is also inconceivable that the reasons for the decision would be different depending on whether they were provided in terms of s 42 or item 5 of Schedule 6 of the Act. The reasons remained the same.

57. The appellants had the right to appeal in terms of s 148(1)(f) of the Act. Consequently, we find that the appellants had the right to appeal against the issuing of WUL.

What was the event for the appeal?

58. The appellants submitted that, if regard is had to the appellants' intention to lodge an appeal after receiving reasons from the first respondent, the trigger event for the date for lodging the appeal was the provision of written reasons.

59. The Kangra argues that the trigger date was 3 December 2021, a date on which it informed the appellants of the decision. From that date onwards, the appellants had all the information which would enable them to lodge at appeal, so the argument goes. This, the Kangra argues obviated the need for the appellants to request for reasons for the decision.

60. The appellants' entitlement to written reasons for the decision cannot be subjected to the letter from the Kangra. The appellants have a constitutional right to be provided with reasons by the decision maker and they are entitled to demand or request for same to be provided.

61. We agree with the appellants that the 30 days period within which the their appeal ought to have been lodged commenced after the appellants were provided with written reasons on 17 November 2022. The 30 days period lapsed on 24 January 2023.

62. The Honourable Mr Justice Du Plessis, AJ also found in *Greyling Trust*[6] that:

> *"I am satisfied that the "record of decision" that the Registrar of the Water Tribunal sent to the parties on 17 November 2022 is the "reasons" referred to in section 148 (3) (c). Since that event occurred last, the 30 days started on 17 November 2022."*

[6] *High Court Judgement, para 69*

63. The appeal was lodged on 14 July 2022, but reasons were only given on 17 November 2022. This means that the appeal was lodged four months before receiving reasons. It is not disputed that the appellants' intention and election has always been to lodge an appeal after receipt of reasons. The fact that the appellants lodged the appeal before reasons were given does not mean they abandoned their election of appealing after receiving reasons.

64. It is further noted that, in its appeal of 14 July 2022, there was a caveat that they reserved their rights to supplement their grounds of appeal after receiving reasons from the first respondent. This is what they stated:

> *"... this appeal is accordingly submitted without the appellants having received the first respondent reasons. The appellants reserve their right to supplement this appeal when the first respondent provides its reasons."*[7]

65. It is our considered view that the appellants' appeal, was triggered by the provision of the reasons and the date from which the 30 days period within which an appeal may be lodged commenced after 17 November 2022.

Was the appeal lodged out of time?

66. Based on our finding that the 30 days period within which the appeal ought to be lodged commenced running from 17 November 2022, it follows that the appeal was lodged timeously.

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[7] *page 24, para-35.*

67. Consequently, this preliminary point must fail.

Condonation

68. If we are wrong in our finding that there was an appeal lodged by the appellants and that it was lodged in time, we proceed to consider whether condonation for the late filing of the appeal ought to be granted.

69. Item 5(2) in Schedule 6 of the Act and rule 4(4) of the Tribunal Rules provides for condonation for late filling of an appeal. It provides:

> *"The Tribunal may, for good reason, condone the late lodging of an appeal or application."*

70. It is trite law that an applicant for condonation must show good cause. The authoritative case dealing with applications for condonations, and more specifically what constitutes good cause, or sufficient cause is *Melane v Santam Insurance Co Ltd*[8]. In this regard, the then Appellate Division held:

> *'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true*

[8] *1962 (4) SA 531 (A).*

discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'[9]

71. The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*[10], per Yacoob J, held that:

'... It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.' (own emphasis)

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[9] *Ibid at 532 C-F.*
[10] *2000 (2) SA 837 (CC), para 3*

72. The appellants made written application in support of their application for condonation. The Kangra also made written submissions in opposing the application for condonation. There was no written opposition by the first respondent. The first respondent rely on oral submissions made by its legal representative during the hearing of the application.

73. The parties submitted written heads of argument which were supplemented by oral submissions during the hearing of the application for condonation.

74. The Kangra contends that from the text of Item 5 in Schedule 6 of the Act there are two different events which together constitute the lodging of an appeal. The first event is constituted by the service of a written notice of appeal upon the relevant responsible authority. The second event is constituted by the lodgement of the original appeal with the Tribunal.

75. According to the Kangra, the Tribunal's power to condone late lodgement of an appeal can only be invoked upon the occurrence of the second event and not any late notification given to the department.

76. According to the Kangra, there is no indication that notice of appeal was served upon the department and therefore the right to appeal lapsed and consequently the Tribunal has no power to grant condonation to the appellants. During oral submission, counsel for Kangra argued that the service of notice of appeal and the lodging of the appeal happened on the same date. It was further argued that the late service of the appeal can only be condoned by the Minister in terms of s 66 of the Act.

77. This is simply not so. There was a notice of appeal served upon the Department, *albeit* by the Registrar of the Tribunal. The department itself does not dispute that it was served with a notice of appeal.

78. During oral submissions, Mr Jhupsee, for the first respondent, referred to the notice he received on behalf of the department from the Registrar of the Tribunal, informing the department of the appeal.

79. Thus, the suggestion by Kangra that there was no notice of appeal is baseless and is rejected.

Period of and reasons for the delay

80. The period of the delay, when reconned from the date on which the appellants were notified of the decision, is seven months.

81. The appellants argues that the delay in lodging the appeal within 30 days from the date they were notified of the decision was caused by the first respondent's failure to provide reasons for its decision.

82. It is not in dispute that the appellants had been requesting for reasons for the decision since December 2021 until April 2022. In all their three requests, the appellants made it clear that they intended to lodge an appeal after receiving reasons.

83. The first respondent conceded that the appellants' request for reasons were not responded to. Eventually, in July 2022 when the appellants lodged their appeal, they

simultaneously applied for condonation for their late filing of the appeal. They did *ex abundant cautela*. In that application, the appellants attributed the delay partly to the first respondent's non responsiveness to their request for reasons.

84. Furthermore, the appellants cite the appointment of OMI Solutions (Pty) Ltd ('OMI'), to provide an independent and objective assessment of the Balgathen WUL. According to the appellants OMI's report was only received on 12 April 2022. Upon receipt of the report, the appellants' legal team had to consider the report.

85. In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*[11] the SCA held that a condonation application must provide a full explanation for the delay as follows:

> *"In general terms, the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the* ***explanation for the delay****; the explanation* ***must cover the entire period of the*** *delay and must be reasonable."*

86. What is glaring on the total period of delay is that the Appellants fails to account for each period of delay and proffered a blanket explanation that the WUL application together with the expert reports were voluminous and had to be considered by the appellants' legal team. This suggest that the appellants needed a period of about 7 months from 3 December 2021, when they were notified of the decision. The explanation provided by the Appellants does not fully cover the entire period of delay.

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[11] *2010 (4) SA 109 at page 117, para B*

Prospects of success

87. The appellants argues that the appeal raises procedural and substantive grounds and argues that the public participation conducted in the Balgarthen WUL application was inadequate; there were material gaps in the WUL application as identified by OMI, in that certain impacts of the WUL were not assessed and there was no provision of adequate mitigation; that Kangra failed to obtain the landowner's consent from the appellants; and the first respondent failed to consider all relevant factors as required by s 27 of the Act.

88. The first respondent argues that the appeal is without merits as the OMI report states that the overall conclusion of the review is that the specialist studies were not fatally flawed, and that the majority of the impact can be effectively mitigated.

89. Firstly, the first respondent's submission incorrectly creates an impression that the reports by OMI were the only findings and that there were no negative findings made. To the contrary, the OMI report also pointed to the recommendation for exclusion zones.

90. During oral submission, Mr Jhupsee was referred to the last paragraph of the reports by OMI which states:

> *"The recommendation for exclusion zones made by Golder (2018) is however considered an extremely important recommendation which should be implemented. Not implementing this recommendation is considered a fatal flaw"*[12]

[12] *OMI Report, pg. 104 of the paginated record of application, para 11.*

91. The first respondent submitted that the appellants ought to have consulted OMI at the time of objection to the application. This would have assisted the department in having all experts reports at its disposal before making a decision on WUL application, so the first respondent argued. This submission was predicated on the reports by OMI having been in existence during the consideration of the WULA. This is incorrect for reason that this report was compiled after the WUL was granted and with a view of determining whether or not there are good grounds for the appeal.

92. However, Mr Jhupsee conceded that if the appellants had obtained the report by OMI at the time of their objection to the application, the department would have had sight of findings of that report.

93. In reply, the Appellants pointed out that the issue raised in the OMI report relating to the exclusion zones, is fundamental as same ought to have been made a condition of the WUL, but it was not.

94. Save for questioning the timing of the OMI report and the contention that the OMI report did not find flaws with the specialist studies, the respondents do not address the other grounds of appeal, such as inadequate public participation process. In reply, Mr Lazarus for the appellants argued that the public participation process is crucial and correctly referred to the case of *Trustees of GroundWork v DG of Water and Sanitation and Another (WTOG/11/2015* (July 2020), para 120, where the Tribunal upheld the appeal by *GroundWork*'s and set aside the WUL, due to lack of adequate public participation as follows:

"The process for water use authorisation is an administrative process which should comply with the principles of fair administrative decision-making. These principles are found both in section 33 of the Constitution but in more detail in section 6 of the PAJA, the Act and the NEMA. The process of allowing the public to participate in a decision-making process is key to ensuring that a fair administrative procedure is followed. A decision can be reasonable on the merits but falter on due process requirements."

95. It is conceivable that in light of what is stated in this report, the department might have come to a different decision in respect of the WULA or imposed conditions to cater for the negative findings of the report.

96. On the basis of the ground on lack of adequate public participation and the exclusive zones, the appeal has reasonable prospects of success.

Prejudice to the parties

97. In the main, the respondents point to the possibility of employment of about 322 employees being put in jeopardy, should the mining activities be terminated, even temporarily. In reply the appellants pointed out that during 2021 the appellants lodged an appeal against the Environmental Authorisation ('*the EA*') granted to Kangra in terms of the National Environmental Management Act 107 of 1998 ('*the NEMA*'), in relation to activities associated with the Adit. As a result of that appeal the EA was suspended pending the outcome of the appeal. The appeal was only determined on 24 June 2022.

98. Similarly, the appeal which is the subject of this application suspended the WUL and again in August 2022, the Greyling Trust interdicted the Kangra from carrying out mining activities at the Adit, until finalisation of the appeal at issue.

99. It is our understanding that the Kangra has not been able to operate, (owing to the High Court interdict granted in August 2023) at the Adit, and as a result of the suspension of the WUL by the current appeal. Therefore, the granting of the condonation would not cause anything new that has not already happened.

100. Looking at the grounds of appeal relied upon by the appellants and the prospects of success, of the appeal, the appellants would suffer prejudice should condonation not be granted. Thus, the prejudice to be suffered by the appellants outweighs any prejudice that the respondents might suffer.

The interest of justice

101. The appeal deals with important issues involving the lawful usage of water and the importance of implementing mitigating measures in instances where mining activities have the potential to pollute water resources.

102. Furthermore, the appeal deals with important procedural aspects to be observed by applicants of WUL, such as adequate public participation and the landowner's consent.

103. It is in the best interest of justice that the issues raised in the appeal, be properly and fully ventilated in the appeal to ensure justice in the distribution and management of water resources.

Conclusion

104. The appellants had a right of appeal, in terms of s 148(1)(f) as soon as the decision on the WUL application was known to them or as soon as they received the written reasons for the granting of the WUL.

105. The appellants were notified of the department's decision to grant WUL to the Kangra on 3 December 2021, however the appellants were only provided with written reasons for the granting of the WUL on 17 November 2022.

106. The trigger event for the commencement of the 30 days period within which the appeal ought to have been lodged is the provision of the reasons by the first respondent.

107. The appeal by the appellants was legally compliant and was made in time, namely, on 12 July 2022. The appeal was received by the Registrar of the Tribunal on 14 July 2022. On the same date, the department was notified of the appellants' appeal.

108. Regarding the condonation, if we were wrong in our findings above, the appeal, the trigger event would have been on 3 December 2021, which is a date on which the appellants would have known of the decision by the first respondent. This would make the appeal of 12 or 14 July 2022 late by about 7 months. However, if regard is had on the reckoning of days in terms of the Interpretation Act and the Act, the appeal would be late by 5 months.

109. As indicated above, the factors to take into account when considering an application for condonation are not individually decisive. The only instance where condonation may

not be granted, on the basis of the consideration of an individual factor, is where there are no reasonable prospects of success. Outside of that, the factors must be viewed collectively.

110. Thus, having regard to the circumstances of this case, the interest of justice dictates that condonation should be granted.

111. The appellants have made out a case for the granting of condonation for the late lodging of the appeal.

Findings by the Tribunal

112. The Tribunal makes the following findings:

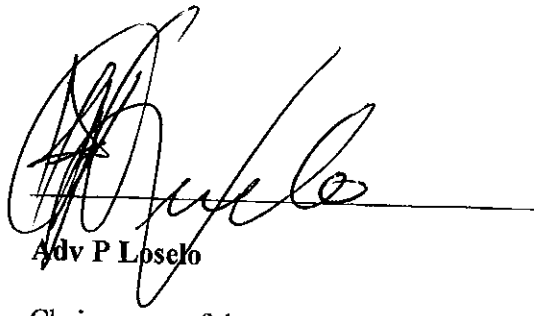
(a) there was a legally compliant appeal lodged by the appellants.

(b) the trigger event for the commencement of the 30 days period within which the appeal ought to have been lodged is the provision of the reasons by the first respondent.

(c) the appeal referred to in subparagraph (a) was not lodged out of time and was in fact lodged four months before the date on which it ought to have been lodged.

(d) that to the extent that condonation was required, the Tribunal would have granted it.

SIGNATURES



Adv P Loselo

Chairperson of the Water Tribunal

I agree

Adv N Lekgetho

Additional Member of the Water Tribunal

Appearances:

For the Appellant:	Adv P Lazarus SC
	Instructed by: Malan Scholes Inc
For the First Respondent	Mr H Jhupsee
For the Second Respondent:	Adv P Louw SC
Instructed by:	Van der Merwe and Van den Berg Attorneys