

IN THE WATER TRIBUNAL

HELD AT PRETORIA

CASE NO: WT 06/08/2008

In the matter between:-

VIERPLAAS BOERDERY BK

APPELLANT

and

THE MINISTER OF WATER AFFAIRS AND FORESTRY 1ST RESPONDENT

DEBORAH GABAAKELWE MOCHOTLHI N.O 2ND RESPONDENT

RULINGS ON POINTS IN LIMINE

APPEARANCES

Coram : L J Lekale (Mr) – Chairperson
Mr H Thompson - Member

For the Appellant : **Adv. JHA Saunders** instructed by
Messrs Van der Merwe & Associates
Incorporated

For the Respondent : **Mr Teffo Mashala** from the first
respondent' Legal Services
Directorate – Pretoria

For the Intended Party : **Mr Martin Grütter** from
Martin Grütter- Attorney for Kitsbeleg
II (Pty) Ltd.

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DETAILS OF HEARING AND REPRESENTATION:

- [1] The appeal hearing was held at Pretoria on the 5th April 2011.
- [2] The Appellant was represented by **Adv. JHA Saunders** instructed by Messrs Van der Merwe and Associates Inc., Attorneys of Pretoria.
- [3] The Respondents, on their part, were represented by **Mr T Mashala** from their Legal Services Directorate in Pretoria.
- [4] The Interested Party, Kitsbeleg II (Pty) Ltd was represented by its attorney **Mr Martin Grütter**.

ISSUE TO BE DECIDED

- [5] The preliminary issue raised by the respondent parties was whether or not the appeal was lodged within the 30 (thirty) day period prescribed by Section 148 (3) of the National Water Act (NWA) read with the provisions of Rule 4 of the Rules of the Tribunal.
- [6] In the event of the foregoing question being decided in the affirmative, the next enquiry was:
 - [6.1] whether or not the Respondents, as the responsible authority, were, in law, entitled to issue a directive requiring the appellant to, effectively, empty its water storage dams and demolish the walls of its dam in terms of Section 118(3) of the NWA; and
 - [6.2] whether or not the Respondents complied with the provisions of Section 3(2)(b) of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) when it issued the Section 118(3) directive on the 20th June 2008.
- [7] In the further event of the question in paragraph [6] above being decided in the affirmative, the Tribunal is required to entertain the merits of the appeal on a date to be communicated to the parties by the office of the Registrar.

BACKGROUND TO THE ISSUE:

- [8] On the 20th June 2008 the Second Respondent, as the delegate of the First Respondent, issued a directive in terms of Section 118(3) of NWA calling upon the Appellant to, *inter alia*, immediately empty the relevant dams and, thereafter, to remove all the earthfill walls that have been built on the basis that the repairs to the dam walls had been done without the necessary licence and there existed serious concern about the safety of the walls.
- [9] The Appellant felt aggrieved by the directive and caused a notice of appeal against the same to be prepared and signed on the 16th July 2008.
- [10] On the 6th August 2008 the Registrar of the Tribunal wrote to the appellants acknowledging receipt of the appeal and, further, required the Respondents on the same date to comply with the provisions of item 5 of schedule 6 to NWA.
- [11] On the 20th May 2009 **Mr Martin Grütter** wrote to the Registrar of the Tribunal placing himself on record as representing Kitsbeleg II (Pty) Ltd and other parties interested in the matter.
- [12] After a number of postponements aimed at *inter alia* allowing interested parties an opportunity to acquire relevant documents, the matter was eventually scheduled for a hearing in earnest on the 5th April 2011.
- [13] On the 1st April 2011 the Appellant submitted a letter to the Registrar announcing that it intended to raise questions of law in limine at the hearing and that it was not in the position to proceed with the hearing on merits because of some outstanding crucial information.
- [14] On the 4th April 2011 the Respondents, on their part, eventually complied with the provisions of item 5 of schedule 6 to NWA by furnishing reasons and documents.
- [15] After the Appellant had raised the relevant preliminary questions **Mr Mashala**, for the respondents, also raised a point in limine to the effect that the appeal was not lodged timeously.
- [16] The proceedings were, thus, limited to the Respondents' point in limine and the question of law raised by the appellant.

SURVEY OF EVIDENCE AND ARGUMENT:

- [17] No oral evidence was adduced. The parties submitted documents and made oral submissions in addition to the bundle prepared by the Registrar.
- [18] **Mr Mashala** submitted to, *inter alia*, the effect that the date on which the appeal was lodged was not apparent *ex facie* the Notice of Appeal and that it could be accepted that the appeal was commenced on the 6th August 2008 because that was the date on which the Registrar acknowledged receipt of the appeal. According to him the respondents only received a copy of the Notice of Appeal when the Registrar forwarded it to them on the 6th August 2011.
- [19] The Registrar of the Tribunal on her part submitted that she received the original Notice of Appeal on the 22nd July 2008 from the Respondent's Legal Services Directorate and that it was most probably lodged with the said Directorate before that date. She further pointed out that documents intended for the Tribunal are almostly invariably left with that Directorate by the users of the Tribunal because the Tribunal's offices are located in the same building as the offices of the First Respondent's Legal Services Directorate.
- [20] On behalf of the Appellant, **Mr Saunders** protested vigorously that the Respondents had embarked on litigation by ambush because he was never informed of the relevant point in advance and, as such, he was not in the position to deal properly and fairly with the same.
- [21] In relation to the points of law Mr Saunders submitted Heads of Argument to the effect that Section 118(3) of NWA does not give the responsible authority the power to order demolition of structures but only allows the responsible authority to give directives with regard to repairs and alterations for purposes of reducing safety risks to acceptable levels.
- [22] **Mr Mashala**, on the other hand, contended that the directive in question seeks to restore the **status quo ante** of the dam walls by requiring the Appellant to do away with the repairs and/or alterations which have been effected illegally and which are creating safety risks. He conceded that references in the directive to, *inter alia*, unlawful storage of water and failure on the part of the Appellant to register all its water uses from the river are simply irrelevant to a S118(3) directive.

- [23] **Mr Grütter** on behalf of interested parties submitted that the directive is directed at the altered or repaired walls of the dams which are perceived by the responsible authority as being unsafe.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- [24] It is clear from the undisputed submissions of the Registrar that:
- [24.1] the Notice of Appeal was received by her office on the 22nd July 2008 from the Respondents' Legal Services Directorate;
- [24.2] the said Notice of Appeal was most probably received before the said date by the said directorate.
- [24.3] it is common practice for such documents to be received by the said directorate.
- [25] It is further apparent from the Notice of Appeal that it was signed on the 16th July 2008.
- [26] There is, with respect, no basis, both on the facts and in law, for the submission by **Mr Mashala** to the effect that the fact that the date on which the notice was received by the office of the Registrar is not apparent *ex facie* the document in question as well as the fact that the Registrar wrote in acknowledgment of receipt of the same on the 6th August 2010 lead to the plausible inference that the appeal was lodged late. Such an inference must be consistent with all the proved facts, and be the most plausible one in order to prevail.
- (see **AA Onderlinge Assuransie – Assosiasie Bpk v De Beer 1982(2) SA 603 (A)**)
- [27] The information from the office of the Registrar is clear that the appeal in question was most probably lodged timeously.

[28] A further contention by **Mr Mashala** to the effect that the Notice of Appeal was not served on the Respondents as required by item 5 of schedule 6 to NWA read with Rule 3 of the Tribunal rules and that the appeal was, as such, not commenced timeously is, with respect, without merit because if the Registrar received the original copy from the Respondents' Legal Services Directorate, a **fortiori** copy of the same was most probably served on the Respondents.

[29] The point raised is, therefore, bad on the facts. In the Tribunal's view the appeal was most probably lodged timeously.

[30] Section 118(3)(c) of NWA provides that:

"(3) The Minister may –

(a)

(b)

(c) direct the owner of a dam with a safety risk to undertake, at the owner's cost, and within a period specified by the Minister, any specific repairs or alterations to that dam which are necessary to protect the public, property or the resource quality from a risk of failure of the dam"

[31] The heading to Chapter 12, in which Section 118 resides, provides, *inter alia*, that:

"The chapter contains measures aimed at improving the safety of new and existing dams with a safety risk so as to reduce the potential for harm to the public, damage to property or to resource quality"

[32] Section 118(3)(a) obliges the Minister, before issuing a directive, to

"(a) be satisfied that the repairs or alterations directed are necessary, adequate, effective and appropriate to reduce the risk to an acceptable level"

[33] **Mr Saunders** contends that the directive effectively requires the Appellant to demolish the dam which undertaking, according to him, is not contemplated and outlined by Section 118(3) which, in his view, is directed at and limited to repairs and alterations.

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- [34] It is common cause between the parties that the dams in question are dams with safety risks.
- [35] It follows, therefore, from the foregoing that if the Minister is, *inter alia*, satisfied that some specific repairs or alterations are **necessary, adequate, effective and appropriate to reduce the risk to an acceptable level**, she may direct the Appellant as the owner of such dams, to undertake such specific repairs or alterations.
- [36] As correctly and effectively submitted by Mr Saunders, NWA does not list or define the repairs or alterations which the Minister may direct the owner to undertake. NWA, however, provides the Minister with the means of identifying the relevant repairs or alterations which she may prescribe by requiring her to be satisfied that they are **necessary, adequate, effective and appropriate**.
- [37] The real question for determination is, therefore, whether or not the removal or demolition of the relevant walls is necessary, adequate, effective and appropriate to reduce the risk to an acceptable level in the subjective view of the Minister.
- [38] The determination of this question can, in the Tribunal's view, better be dealt with as part of the merits as the respondents may need a fair opportunity to demonstrate that the Minister is satisfied in the relevant respects by way of evidence.
- [39] The Appellant, further, effectively invites the Tribunal to review the directive in question in terms of PAJA.
- [40] Section 6(2) read with Section 1 of PAJA confers the power to undertake such an exercise on the courts or a tribunal established for that purpose.
- [41] The Water Tribunal is neither a Court of law nor a Tribunal established for the purposes of reviewing administrative actions judicially in terms of PAJA.

- [42] In terms of item 6(3) of schedule 6 to NWA appeals and applications before the Water Tribunal take the form of a rehearing. The Tribunal is subject to the provisions of PAJA and, in hearing appeals or applications, it must comply with and observe the provisions of PAJA.
- [43] The enquiry into whether or not the Respondents complied with the provisions of PAJA when the impugned directive was issued, therefore, does not arise before the present forum because the Tribunal, effectively, hears the matter **de novo** and does not exercise review jurisdiction.

RULING

- [44] In the result the appeal is properly before the Tribunal.
- [45] The matter shall, therefore, be rescheduled for appeal hearing proper in due course by the office of the Registrar.

DATED AT PRETORIA ON THIS 11th DAY OF MAY 2011.



L.J. LEKALE
CHAIRPERSON