IN THE WATER TRIBUNAL **CASE NO. WT25/03/2015**
HELD AT PRETORIA

In the Appeal between:

WERDA HANDEL (PTY) LTD **FIRST APPELLANT**
FOURNEL (PTY) LTD **SECOND APPELLANT**
and
DIRECTOR GENERAL: DEPARTMENT OF WATER AND SANITATION **FIRST RESPONDENT**

TSHEDZA MINING RESOURCES (PTY) LTD: MANUNGU COLLIERY **SECOND RESPONDENT**

DECISION ON PRELIMINARY ISSUE: 09 FEBRUARY 2017

APPEARANCES:

Coram:	Prof. T Murombo – Panel Chair Adv. TAN Makhubele SC – Member Ms MMD Nkomo – Member
For the Appellants:	Adv. J du Plessis SC instructed by Scheibert and Associates Inc. represented by attorney Mr. Delport
For the First Respondent:	Adv. MS Mphahlele instructed by the State Attorney, Pretoria Mr J Sebelemetsa – State Attorney Mr T Mashala – Department of Water and Sanitation
For the Second Respondent:	Adv. P Daniels SC - with Adv. I Currie instructed by Malan Scholes Inc.

INTRODUCTION, THE FACTS, AND STATEMENT OF THE ISSUE

1. The first appellant, Werda Handel (Pty) Ltd is the owner of portion 11 (Portion 11) (a portion of portion 10) of the farm Weilaagte 271 IR (Weilaagte). Portion 11, accordingly, forms part of the Mining Area. The second appellant, Fournel (Pty) Ltd conducts a wire manufacturing business from premises situated on Portion 11, which it rents from first appellant. The first and second appellants will hereinafter be referred to as "the appellants".

2. The first respondent, the Director-General of the Department of Water and Sanitation, is the Responsible Authority mandated to consider applications for, and issue water use licences in terms of the National Water Act, 36 of 1998 (referred to in full or the Act, as the case may be). The mandate may be delegated to appropriate national or provincial authorities in the first respondent's department. The first respondent will hereinafter, interchangeably, and depending on context, be referred to as 'the responsible authority / the DG / the department or DWS.'

3. The second respondent (hereinafter referred to as 'Tshedza Mining') is a private company in the business of mining and is a holder of a mining right, as defined in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002, granted to it on 24 February 2011 in terms of the said Act. The mining area to which the mining right relates comprises the farms Weilaagte 271 JR and Welgevonden 272 JR, situated in the Magisterial District of Delmas, Mpumalanga. Tshedza Mining is conducting open cast coal mining in this area.

4. Tshedza Mining appointed an Environmental Assessment Practitioner (hereinafter referred to as 'the EAP') to apply for its environmental authorisation and the integrated water use licence required for the mining operations.

5. On 8 November 2012, Tshedza Mining applied to the DWS for an Integrated Water Use Licence with respect to various water uses for its Manungu coal mining operations. This application was received by the provincial authority of the DWS, who considered it incomplete, and therefore returned it to the Tshedza Mining with specific directives on what further information was required. Among other things, the DWS's directive to Tshedza Mining required it to conduct a public participation process and submit a 'report with issues of concern and solutions.'

6. On 23 August 2013, the EAP acting for Tshedza Mining, addressed a letter to the appellants and other interested and affected parties indicating that it had applied for an Integrated Water Use Licence and calling on such persons to contribute written comments.

7. In material part, the letter of the 23rd of August 2013 read:

> 'In order to identify all relevant matters regarding the issuing of the Environmental Authorisation and Integrated Water Use Licence, as well as to ensure that all aspects regarding the impact of the proposed activity are identified, you are hereby invited to register as an interested and affected party and to contribute your written comments to Mrs Mariante Herbst at ECO-GAIN Consulting.'

The Appellants submitted that they did not receive the EAP's letter of 23 August 2013.

8. The record indicates that on 29 August 2013 Eloff Coal Company ('Eloff Coal') lodged a letter of objection with the EAP. On 6 September 2013, Total Coal South Africa ('Total Coal') also submitted a letter with comments by email. The letters from Eloff Coal and Total Coal were all written before the publication of any notice by the EAP, so they possibly responded to the 23 August 2013 letter.

9. On 12 September 2013, the EAP, on behalf of Tshedza Mining, caused to be published a formal notice of the application for an 'Environmental Authorisation and Integrated Water Use Licence.' This notice was published in the Witbank News of 13 September 2013, and placed at several prominent areas in the area. Among other things, the notice of 12 September 2013 invited any person to register as interested and affected person as well as submit written comments to the EAP.

10. On 19 November 2013, the EAP issued another letter to the appellants on similar terms. On 13 December 2013, the appellants wrote a letter to the EAP, which they submit, was an objection to the integrated water use licence application. The letter partly stated that;

> "Your description of the potential ground water impacts post closure, are also of significant concern. On page 188, it is stated that intuitively, it would be expected that this raise in groundwater, could result in decanting of some open-cast areas. To predict possible decanting positions, a detailed 3-D numerical model should be constructed once the mining plans have been finalised...
>
> We find it absolutely astounding that the mining plans have not been finalised, despite the fact that the Mining Right has been granted. The post-closure water pollution risk must be investigated and quantified and plans must be drawn up to mitigate the impacts as per the NWA, DWAF, Best Practice Guidelines G5: Mine Closure (Department of Water Affairs and Forestry, 2008, Best Practice Guideline G5: Water Management Aspects of Mine Closure.'

11. It is common cause that the EAP did not include this letter in the documents submitted for the water use licence application, neither did she respond to the letter nor respond to the issues raised therein. However, the EAP did record

appellants' letter as an objection to the Environmental Authorisation application and included it in the Basic Assessment Report, apparently, as the only objection received to the issuance of the environmental authorisations.

12. On 25 January 2014, the EAP filed the amended Integrated Water Use Licence application with the DWS. No public notices calling for interested and affected parties to comment or object to the revised application were issued. On the record no further comments on, or objections to this revised application are recorded, except the letter written directly to the DG by the appellants on 27 January 2015. This water use licence application of 25 January 2014 contains a report on public participation, which lists Eloff Coal and Total Coal as the only persons who lodged objections (in 2013) to the application. The Appellants are not listed as interested and affected parties or objectors.

13. In the answering affidavit filed by DWS, a submission was made that the DWS directed Tshedza Mining to issue a notice in terms of section 41(4) of the National Water Act 36 of 1998 (referred to in full or 'the Act' depending on context). However, it became clear during the hearing that at no stage did the DWS issue such a directive. Therefore, any notices issued by the Tshedza Mining were of its own accord.

14. In April 2014, the appellants enquired of the EAP if Tshedza Mining had re-applied for water use licence and what was the status of the application. The EAP advised the Appellants that Tshedza Mining was *'still in the process of applying for a Water Use Licence.'* On 24 April 2014, the EAP informed the appellants that

there was, in fact, an application for a water use licence and directed them to documents in a drop box account which they could access if they so wished.

15. Nothing appears to have happened from April 2014 until 27 January 2015, when the appellants wrote a letter of objection directly to the DG objecting to the granting of the water use licence to Tshedza Mining. The department submitted that Tshedza Mining's application was considered on 30 January 2015 and a decision to issue the licence was made on that date. The actual licence *(No 04/B20A/ACGIJ/2621)* is dated 23 February 2015.

16. The department indicated in its submissions that the letter by the appellants dated 27 January 2015 was disregarded as an objection because it was filed out of time and addressed to the wrong party. The department submitted further that such a letter should, and could only, have been addressed to Tshedza Mining.

17. On 19 March 2015, the appellants lodged the Appeal to the Water Tribunal ('the Tribunal') against the decision of the department to grant the water use licence to Tshedza Mining. The Water Tribunal case number of the Appeal is WT25/03/2015.

18. In its Answering Affidavit in response to the Appellants, the department submitted that the appellants were not properly before the tribunal because they did not qualify as objectors referred to in section 148 (1)(f) of the National Water Act. Tshedza Mining associated with this submission and the Chairperson of the

tribunal directed the parties to make submissions on this preliminary issue before the merits of the appeal could proceed.

19. The parties filed affidavits, and the appellants and Tshedza Mining also filed heads of arguments on the preliminary issue and the matter was set down for hearing on the 9th of February 2017.

20. Appeals to the Water Tribunal are lodged in terms of section 148 (1) of the National Water Act. A person lodging an appeal must fall into one or more of the categories listed in section 148 (1) of the Act. For our purposes, the relevant provision (section 148 (1)(f)) provides that:

> 'There is an appeal to the Water Tribunal...
>
> (f) subject to section 41 (6), against a decision of a responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies, by the applicant or by *any other person who has timeously lodged a written objection against the application*.' *(emphasis added)*

21. Therefore, the narrow preliminary issue to be decided by the Tribunal is whether the Appellants meet the requirements of section 148(1) (f) of the National Water Act. In simple language, whether the Appellants are "any other person who has *timeously* lodged a *written objection* against the application.'

THE LEGAL CONTEXT

22. Unless authorised under a general authorisation, any use of water in South Africa must be either an existing lawful water use or be authorised under a water use licence (section 4 of the National Water Act). The National Water Act provides the

legal framework for the application and granting of water use licences. Section 40 and 41 of the Act provides for the process to be followed when one applies for a water use licence. Any person who wishes to object to an application for a water use licence may do so in response to a notice issued in terms of section 41(2) (c) or 41(4)(a)of the Act or of their own accord. Section 41(4) (a) of the Act grants the Minister powers to direct an applicant to issue a notice calling for objections. This power has since been confirmed to be discretionary and not mandatory.[1] Thus, the Minister may or may not issue such a directive in any given case.

23. Persons aggrieved by the decision of the responsible authority made in terms of section 41 of the Act may lodge an appeal against such a decision in terms of section 148 (1) to the Water Tribunal established in terms of section 146. As noted in paragraph [20-21] above, only 'the applicant' or 'any other person who has timeously lodged a written objection against the application' may appeal to the Water Tribunal. In a recent decision,[2] the High Court ruled that the objection referred to in section 148(1)(f) of the Act is not necessarily an objection lodged in terms of section 41(4)(a)(ii) of the Act; otherwise, so the court held, the legislature could have explicitly made that reference. We agree with this correct interpretation of section 148(1)(f) of the Act, which ended the position in a long line of Water Tribunal decisions[3] that sought to confine section 148(1)(f) to

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[1] *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) para 37.

[2] Ibid.

[3] This narrow approach is exemplified by the cases of *Gideon Anderson t/a Zonnebloem Boerdery v Department of Water and Environmental Affairs, and Another* Case No: WT 24/02/2010 para 23 (23.10-23.12); *Escarpment Environment Protection Group and Another v Department of Water Affairs and Another* Case No: WT 03/06/2010 para 19 holding that 'a liberal interpretation may lead to the opening of a floodgate which could not reasonably possibly have been intended by the legislature when it enacted section 148(1)(f) of NWA.'

objections lodged in terms of section 41(4)(a)(ii) only – a too restrictive interpretation when it is considered that the obligation to issue a directive by the Minister in section 41 (4) is discretionary.

24. The National Water Act is one of the Specific environmental management Act listed in section 1 of the National Environmental Management Act, 107 of 1998 ('the NEMA'). The inclusion of the National Water Act as a specific environmental management Act means that it is subject to the overarching principles of environmental management in section 2 of the NEMA. Among other principles, section 2 (4) of the NEMA provides that:

> '(f) The *participation of all interested and affected parties in environmental governance must be promoted*, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.
> (g) Decisions *must take into account the interests, needs and values of all interested and affected parties*, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
> (k) Decisions must be taken in an open and transparent manner, and *access to information* must be provided in accordance with the law.' *(emphasis added)*

25. The purpose and effect of these principles of environmental management is elaborated in section 2 (1) of the NEMA. It provides, in material part, that:

> 'The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and –
>
> (c) serve as guidelines by reference to which *any organ of state must exercise any function* when taking any decision in terms of this Act or *any statutory provision concerning the protection of the environment.*

> *(e)* guide the interpretation, administration, and implementation of this Act, and *any other law concerned with the protection or management of the environment. (emphasis added)*

These NEMA provisions favour a liberal approach to the interpretation of section 148(1) (f) and 41 of the National Water Act and the procedure for public participation in environmental decision-making. Indeed, such an approach promotes, and is consistent with the ethos and spirit of section 24 and 33 of the Constitution of South Africa.

26. Since Tshedza Mining appointed and tasked a consultant who they refer to as an Environmental Assessment Practitioner ('the EAP') it is appropriate to clarify the role and functions of the EAP in the relevant legislation. The EAP is appointed in terms of Regulation 16 of the Environmental Impact Assessment Regulations, 2010 published by Government Notice No. R.543 in Gazette No.33306 on 18 June 2010 as amended by Government Notice No. R. 660 in Gazette No.33411 on 30 July 2010. These regulations are made in terms of section 24 (5) and 44 of the NEMA. New EIA regulations have since been made applicable from December 2014. However, for the purposes of this matter the 2010 regulations are the applicable regulations. Regulation 17 of the same regulations provides for the 'General requirements for [EAPs] or a person compiling a specialist report or undertaking a specialized process.' These regulations are important in this matter because the decision regarding the legal status of the Appellants' letter of objection dated 13 December 2013 revolves around what the EAP did with the letter.

27. Regulation 17 provides that:

'An EAP appointed in terms of regulation 16(1) must-

(a) be independent;

(b) have expertise in conducting environmental impact assessments, including knowledge of the Act, these Regulations and any guidelines that have relevance to the proposed activity;

(c) perform the work relating to the application in an objective manner, even if this results in views and findings that are not favourable to the applicant;

(d) comply with the Act, these Regulations and *all other applicable legislation*;

(e) take into account, to the extent possible, the matters referred to in regulation 8 when preparing the application and any report relating to the application; and

(f) disclose to *the applicant* and the *competent authority all material information in the possession of the EAP that reasonably has or may have the potential of influencing* –

(i) any decision to be taken with respect to the application by the competent authority in terms of these Regulations; or

(ii) the objectivity of any report, plan or document to be prepared by the EAP in terms of these Regulations for submission to the competent authority.' *(emphasis added)*

28. Furthermore, decisions made by a responsible authority in terms of the National Water Act are administrative action in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and must therefore fulfil the prescripts of that legislation. Such decisions must comply with section 3 of the PAJA[4] read with

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[4] '(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) *(a)* A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –...

(ii) a reasonable opportunity to make representations;

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to – ...

(b) present and dispute information and arguments.'

section 33 of the Constitution, as correctly held by the court in *Escarpment Environment Protection Group v Department of Water Affairs.*[5]

29. In addition to the need to promote administrative justice as mandated in section 33 of the Constitution of South Africa; the scheme provided for in the National Water Act for water use licence applications and management of the national's water resources is aimed at fulfilling the constitutional duties of the state and every person, which provides everyone with a right to an environment not harmful to health and well-being. Section 24 (2) of the Constitution further requires the state to enact legislation and take other measures to 'prevent pollution and ecological degradation, (ii) promote conservation, and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.' Measures in the National Water Act aimed at preventing water pollution include the requirement for a water use licence applicant to investigate possible water pollution or degradation from its activities, provide adequate measures to mitigate such pollution, and fund the cost of implementing such measures. The process of calling for objections and considering objections is critical for the ensuring effective prevention of water pollution or degradation of the country's water resources.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

30. The parties were asked to make written submissions based on which this decision was made. On 9 February 2017, we called the parties to a hearing on the preliminary issue to address arguments on the issues raised on the papers.

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[5] *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) para 23.

31. The Appellants submitted that their letter dated 13 December 2013 addressed to the EAP constituted a valid objection in terms of section 148(1)(f) of the Act. Tshedza Mining or their EAP, do not deny receiving the letter, reviewing it, and then disregarded it as *de minimis* or 'pro forma'. The Appellants were not told by the EAP or Tshedza Mining that the letter had been disregarded because it was considered a bare objection. A decision on the water use licence was only made two years later in January 2015. The Appellants further submitted that having felt ignored by the Tshedza Mining, through their EAP, they decided on 27 January 2015, to submit an objection directly to the decision maker, the DG. They were unaware that the DG was due to make a decision on Tshedza Mining's application on 30 January 2015.

32. The Appellants therefore argued that their objections (both letter of 13 December 2013 and the second one of 27 January 2015) were lodged in good time for the decision maker to consider them. They submitted that both letters consistently send a clear signal of their disapproval of the granting of the licence on the papers as lodged, and proffered suggestions for further water investigations and management plans necessary before the water use licence could be approved.

33. The Appellants could not, however, explain why after the provision of information by the EAP on 24 April 2014, they did not do anything further until 27 January 2015. There was no evidence as to what documents were in the drop box to which the Appellants were directed. Presumably the documents submitted by Tshedza Mining to the DWS.

34. Equally, however, Tshedza Mining could not explain why the exhortation for a meeting from the Appellants was ignored. There was no explanation as to why Tshedza Mining did not engage with the substantive issues raised in the Appellants' letter during this interim period. The Appellants therefore submitted that based on the above, their right to lodge an appeal to the Water Tribunal in terms of section 148 (1) (f) of the Act was beyond question.

35. The department submitted that the preliminary issue rests on whether or not the two letters written by the Appellants on 13 December 2013 to the EAP, and on 27 January 2015 directly to the DG, constitutes valid objections envisaged in section 148(1) (f) of the Act.

36. In as far as, the letter dated 13 December 2013 is concerned, the department never saw the letter, and Tshedza Mining did not include the letter with the documents submitted in support of its application. The department regarded the application lodged on 12 November 2012 as the one and only application lodged by Tshedza Mining. Subsequent communication between the department and Tshedza Mining regarding the application was a normal process that happens when an application is being considered. Thus, the return of the first application with directives to gather further information did not nullify the November 2012 application, which remained pending.

37. Given the above understanding, the department was surprised to receive the Appellants' letter dated 27 January 2015 objecting to the granting of the water use licence. Firstly, this was admittedly the first time the department heard of the

Appellants as interested and affected parties or objectors because they were never included in the list of interested and affected parties or objectors compiled by Tshedza Mining's EAP in 2012 and 2014.

38. Secondly, the EAP or Tshedza Mining did not take any steps to bring to the attention of the DG the fact that the Appellants had in fact submitted the letter of 13 December 2013, and further that in April 2014 they had made enquiries on the status of the water use licence application. The DG cannot be faulted for assuming that the Appellants were opportunist or frivolous objectors who had waited from November 2012 until January 2015 to lodge their objection. This is precisely because Tshedza Mining through their EAP did not present the department with full information, which had been received since 2012 when they lodged their water use licence application.

39. Concerning the second objection letter by Appellants dated 27 January 2015, which was addressed directly to DG; the latter argued that this letter was never considered as a valid objection because it was not lodged timeously. Pressed for elaboration counsel for the department argued that the letter was addressed to the wrong party, the department. Objections may only be addressed to applicant for a water use license, Tshedza Mining in this case. This argument is despite section 41(2)(b) of the Act which provides that:

> 'A responsible authority – may invite written comments from any organ of state which (sic) or person who has an interest in the matter; and must afford the applicant an opportunity to make representations on any aspect of the licence application.'

The National Water Act does not contemplate that objections to a water use licence may only be submitted to the licence applicant. It provides for different avenues for activation of objections and the party to whom they may be submitted.

40. Clearly, the department may also receive written comments under certain circumstances. The approach taken by the department runs contrary to the decision of the court in *Earthlife Africa* where it was held that 'before making his/her decision, the decision maker should be fully informed of the submissions made on behalf of interested parties, and he/she should properly consider them...'[6] The court in *Earthlife Africa* further noted that as long as the decision-maker has not decided, nothing prevents interested and affected parties from making submissions on the matter provided such submissions are made within a reasonable time to permit meaningful consideration by the decision-maker. This assumes the interested and affected parties are aware of the decision-making timelines. If they are not aware of internally determined decision making timelines – *as was the case here* – their right to administratively fair decision and to participate cannot be curtailed on that basis.

41. Counsel for the department further stated that the issues raised in the objection of 27 January 2015 were too complex to be considered in merely three days, but this was immaterial and secondary because the department had already made-up its mind that the letter was lodged out of time and to the wrong party. Therefore, the department disregarded the appellants' letter of 27 January 2015.

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[6] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) para 75.

It was submitted that in fact the department was due to make a decision on Tshedza Mining's application for a water use licence on 30 January 2015; hence the Appellants' second letter was too late coming three days before the responsible authority made a decision.

42. The department accepted that there was no legal requirement for it to make its decision on 30 January 2015. It also conceded that when the appellants wrote their objection on 27 January 2015, they did not know, and could not reasonably have known when the decision was to be made, or indeed that it was to be adjudicated on the 30th of January 2015. We asked the department if any prejudice would have been suffered if they had taken the appellants' second letter (27 January 2015) and send it to Tshedza Mining for a response before they made a decision. The department said that, in principle, they could have done that, but only if they had regarded the letter as an objection filed in good time. The sense of good time depends on the facts of each case.

43. On behalf of Tshedza Mining, counsel submitted that a decision on whether or not the letter of 13 December 2013 constituted a valid objection in terms of section 148 (1)(f) of the Act was dispositive of the preliminary matter. If the panel decides that the letter was a valid objection then the preliminary point fails and the matter proceeds to the merits.

44. Tshedza Mining argued that both of the appellants' letters dated 13 December 2013 and 27 January 2015 were not valid objections for the following reasons:

44.1. Firstly, as at 13 December 2013 there was no application for a water use licence to which the appellants could object, rather there was an application for an environmental authorisation only. To this end, the letter of 13 December 2013 was accepted and noted as an objection to the application for an environmental authorisation. Indeed, on the record the Basic Assessment Report captures the appellants' letter of 13 December 2013 as an objection, and a response to the objections raised is noted in the report submitted to the Department of Environmental Affairs (not the Department of Water and Sanitation).

44.2. In this respect, Tshedza Mining disagreed with the department on the status of the application lodged on 8 November 2012. This influenced the assessment by both the department and Tshedza Mining of the time lapse between the application and the lodging of any objections by the Appellants. In particular, to the department, the second letter of objection filed on 27 January 2015 coming two years after the initial application; was unreasonably late, making the objection out of time.

To Tshedza Mining, the same letter (27 January 2015) was written nine months after the application (re-submission) of 25 January 2014. Tshedza Mining argued that as of April 2014 the Appellants had full and complete information regarding the water use licence application as per the letter from the EAP dated 14 April 2014. Therefore, so Tshedza Mining submitted, the Appellants should have lodged their objection within a

reasonable time from April 2014. Writing a letter on 27 January 2015 was not a timeous reaction to information provided nine months prior.

44.3. Secondly, there was no evidence that Tshedza Mining knew that the department was to adjudicate its application on 30 January 2015. In fact, Tshedza Mining was not aware of this letter of objection written by the appellants directly to the DG on 27 January 2015 because it was never copied to them. The department confirmed that, upon receiving the appellants' letter, it did not send it for a response to Tshedza Mining. For their part, Tshedza argued that the January 2015 letter was invalid because they never saw it as the applicants and could not have captured or responded to it.

44.4. Thirdly, Tshedza Mining argues that the letter of 13 December 2013 is not a valid objection because it is a 'pro-forma objection' that does not raise any substantive issues worthy of consideration. In simple terms Tshedza Mining regarded the Appellants' first letter as a frivolous objection to be disregarded.

45. This third reason given by Tshedza Mining (which the department associated with – albeit never having received the letter) requires us to decide what constitutes an 'objection' in terms of section 148(4)(f) of the Act. The Act does not define the term 'objection'. In the absence of a such a definition, we considered the ordinary meaning of the word 'object' or 'objection'. If such meaning does not lead to an absurdity in the operation of section 148 (1) (f) of

the Act, then we will adopt it. If the ordinary meaning of the word does not serve the purpose of the legislation then we will have to take a purposive approach to interpreting the word.

46. The Oxford English Dictionary presents four broad possible meanings of the word 'objection'. These are as follows;

> 'A reason or argument put forward in opposition to others; a statement directed against a person, position, assertion, etc.; a dissenting opinion. Later also (more generally): an expression or feeling of disapproval, dissatisfaction, disagreement, or dislike.'
> 'A written or oral statement of (reasons for) legal opposition to an argument, piece of evidence.'
> 'The action or an act of challenging or disagreeing with something; protest against or opposition to something; counter-argument.'
> 'The act of putting or condition of being put in the way, or so as to intercept something or someone else; interposition.'[7]

47. Similarly, *Webster's Comprehensive Dictionary International Edition* defines objection as '[t]he act of objecting. An impediment raised; a dissenting argument; an adverse fact.' 'Object' is defined as '[t]o offer arguments or opposition; dissent. To feel or state disapproval; be averse.' *Black's Law Dictionary* only defines 'objection' in the legal procedure usage, which is irrelevant here.

48. A perusal of the appellants' letter of 13 December 2013 shows that, not only did the appellants object in the literal meaning of the word, but they also

[7] "Objection, n. and int." *OED Online*. Oxford University Press, December 2016. Web. 21 February 2017.

'challenged' 'disapproved of' the water use licence application, putting forward reasons and conditions subject to which the application should be considered. To quote the letter again, the appellants argued that;

> "Your description of the *potential ground water impacts post closure*, are also of *significant concern*. On page 188, it is stated that intuitively, it would be expected that this raise in groundwater, *could result in decanting of some open-cast areas*. To predict possible decanting positions, a detailed 3-D numerical model should be constructed once the mining plans have been finalised"
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> We find it *absolutely astounding* that the mining plans have not been finalised, despite the fact that the Mining Right has been granted. The *post-closure water pollution risk* must be *investigated and quantified and plans must be drawn up to mitigate the impacts* as per the NWA, DWAF, Best Practice Guidelines G5: Mine Closure (Department of Water Affairs and Forestry, 2008, Best Practice Guideline G5: Water Management Aspects of Mine Closure.'[8] *(emphasis added)*

49. Lastly, we could not find any clearer statement of an objection than, the last paragraph of appellants' letter which states that;

> 'In view of the above, *we have to object in the strongest possible sense* to the applications for a Water Use Licence and Environmental Authorisations.' [9]

50. The extracts from the appellants' letter of 13 December 2013 unequivocally shows that the appellants were raising matters of real and substantive concern regarding the integrated water use licence application. Attempts to separate the issues raised relating to the environmental authorisation and integrated water use licence application is untenable on the facts. That defies the notice issued by the EAP, which announced an application for 'Environmental Authorisation

[8] Page 99 record.
[9] Ibid.

and Integrated Water Use Licence.' The issues of underground water pollution and possible decanting of acid mine drainage directly implicate the use of water by Tshedza Mining. These are critical impacts that are at once environmental and water use related.

51. It is not possible, as Tshedza Mining sought to do, to separate objections raised against the environmental authorisation and those raised against the water use licence. Such an approach flies in the face of the now entrenched holistic and integrated environmental (water resources) management and the ecosystem approach that underlies the National Water Act and the NEMA. Consideration of cumulative environmental impacts of an activity implies that an integrated approach must be taken even in interpreting documents prepared to obtain environmental authorisations and water use licences. The process for environmental authorisation (popularly called environmental impact assessment (EIA)) includes the assessment of impacts of an activity on water, wetlands, and catchment areas. Indeed the definition of 'environment' in section 1 of the NEMA includes 'water'. The letter of 13 December 2013 literally objected to both the environmental authorisation and the water use licence application.

52. Surprisingly, the EAP acting on behalf of Tshedza Mining considered the issues raised by the appellants in their letter of 13 December 2013 very relevant and important objections to the environmental authorisation. She therefore included them in the Basic Assessment Report submitted to the Department of Environmental Affairs. No reasons are given as to why the very same letter was considered as insignificant for purposes of the water use licence application.

This is especially bewildering given that the EAP had published one notice regarding the integrated applications on 12 September 2013. The nature of the notice meant a person could object to one or both applications in one and the same correspondence, because the application process was integrated.

53. It is important to note that the EAP accepted and recorded objections received from Eloff Coal and Total Coal on 29 August and 6 September 2013, respectively. The issues raised in those two objections are materially the same as those raised by the appellants. Total Coal raised concerns regarding 'evidence of investigation on the potential surface and groundwater impact on joining properties' as well as 'adequate environmental (water...) monitoring points [to be] put in place to help in determining any possible impacts on nearby properties.'

54. To say that the Eloff Coal and Total Coal objections were valid and submitted in good time, while the appellants' objection could not be similarly regarded, is illogical and inconsistent with fair environmental decision-making. The High Court has correctly explained what 'in good time' or 'timeously' mean in section 148(1)(f) of the Act. We endorse the finding in *Escarpment Environment Protection Group* that;

> 'The proper enquiry...is not what written objection means in the context of s 148(1)(f) but what timeously lodged a written objection means in that context. And indeed to interpret s 41(4)(a)(ii) to mean that an objection lodged after a date specified in the subsection was not timeous in the sense that such an objection should ipso facto be excluded from consideration would be constitutionally offensive. [A] written objection submitted after the specified date but in good time to be dealt with during the decision making process, must be taken into account. It seems strange to conclude that one and the same written objection may be

timeous for the purposes of the s 41 decision making process (the single purpose for which it was solicited) but untimeous for the purposes of s 148(1)(f).'[10]

55. Indeed, in that case, the parties did not challenge the substantive content of the objection, like what the respondents did regarding the appellants' letter of 13 December 2013. We interpreted what a written objection is *in casu* given the submission by the respondents that, even if the letter of 13 December 2013 was lodged timeously, it substantively, did not constitute a real or valid objection because it was a pro forma objection.

56. In any case, the EAP appointed by the Tshedza Mining had a legal obligation in terms of the EIA Regulations to submit all information received during the application process to the applicant in the water use application (Tshedza Mining) and to the competent authority (Department of Environmental Affairs). This was in fact done. However, then to fail to submit the same information to the DWS is neglect of the duties of an EAP – especially if the EAP has been tasked in the same process to apply for a water use licence. It was not for the EAP to decide whether the letter of 13 December 2013 was a valid objection or not. That was the decision to be made by the DG, having regard to all the information available in the application.

57. The principles in NEMA, explained above paragraph [24-25] that apply to the administration and interpretation of the NWA require that interested and affected parties be given an opportunity to participate when decisions that may

[10] *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP), para 39.

affect them are being made. A process that that is participatory from the onset may very well be expeditious than an exclusionary one which exposes the applicant to avoidable legal challenges.

FINDINGS AND DECISION

58. Taking into account the provisions of the NEMA, the National Water Act, the PAJA, all read in the context of the Constitution (sections 24 and 33), and having applied our minds to the submissions by the parties we find as follows:-

58.1. The letter written by the Appellants addressed to the EAP acting for Tshedza Mining, constitutes a valid objection to the application for an integrated water use licence lodged by Tshedza Mining with the department on 8 November 2012. The letter was not a bare objection or pro forma objection but, on the contrary, it raised matters of serious concern regarding how Tshedza Mining was going to identify and mitigate potential impacts of its mining activities on surface and groundwater resources in the mining area.

58.2. We further find that the letter raised fundamental procedural issues, which the department (DG) had to deal with before deciding whether or not to grant Tshedza Mining the water use licence. These include the lack of critical and required mitigating plans to manage the risk, and potential legacy water pollution problems after decommissioning or closure of the mine.

58.3. The letter was filed with Tshedza Mining well in good time for a decision, which was made in January 2015 and dated 23 February 2015.[11] The fact that the EAP appointed by Tshedza Mining chose to exclude the letter from the information submitted to the department, contrary to the EAP's legal obligations, works against Tshedza Mining. It was the obligation of the DG to consider the validity of all objections raised in the letter and evaluate whether Tshedza Mining had adequately responded to the issues raised when deciding the application. To do that, the DG had to have the letter on file. Tshedza Mining however neglected to submit the letter with its application.

58.4. Even if the letter of 13 December 2013, is for some reason an invalid objection, we find that the letter by the Appellants addressed to the department dated 27 January 2015 is also a valid objection, which was lodged in good time for the DG to make a decision. The application had been pending before the department since 8 November 2012 and there was no reason advanced why the three days would have caused any prejudice. The DG is legally bound to consider objections received within a reasonable time before a decision is made. This includes by sending such objections to the licence applicant (Tshedza Mining) to solicit their response to the issues raised and then to make a decision with all that information available. The 27 January 2015 was reasonable because the Appellants had no idea 30 January 2015 was going to be the decision day.

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[11] In the sense in which the word 'timeous' was defined by the court in *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP), para 38.

58.5. The fact that the letters were all written without a directive being issued by the department (responsible authority) in terms of section 41(4)(a)(ii) of the Act is immaterial given the decision in *Escarpment Environment Protection Group v Department of Water Affairs* that the validity of an objection for purposes of section 148(1)(f) does not necessarily depend on section 41(4) of the Act.[12] The exercise or non-exercise of her discretionary power by the responsible authority under section 41(4)(a) of the Act cannot render ineffective the right to administrative justice, participatory and inclusive environmental decision-making enshrined in section 33 of the Constitution read together with the principles in section 2 (4) of the NEMA and section 3 of the PAJA.[13] With or without lodging an objection directly responding to a section 41(4)(a)(ii) notice, any interested and affected person may lodge an objection against an application for a water use licence as long as such an objection is lodged timeously or within a reasonable time to be considered by the decision maker.[14] What constitutes a reasonable time depends on the circumstances of each case.

59. We therefore dismiss the preliminary point *(point in limine)* raised by the DG and Tshedza Mining. The appellants meet the requirements of section 148(1)(f) of the National Water Act, in that they are persons 'who...timeously lodged a

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[12] *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) para 39.
[13] Ibid, para 40 and authorities there cited.
[14] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) para 78.

written objection against the application' for an integrated water use licence by Tshedza Mining.

HANDED DOWN AT PRETORIA ON THIS 6TH DAY OF MARCH 2017

TUMAI MUROMBO
Member, Water Tribunal (Chairing)

I agree, and it is so ordered

TAN MAKHUBELE SC
Chairperson, Water Tribunal

I agree, and it is so ordered

MALEHO MD NKOMO
Member, Water Tribunal