IN THE WATER TRIBUNAL **Case No: WT 01/17/WC**

In the Appeal between:

WEST COAST ENVIRONMENTAL PROTECTION ASSOCIATION **Appellant**

And

MINISTER: DEPARTMENT OF WATER AND SANITATION **First Respondent**

CHIEF DIRECTOR: WESTERN CAPE DEPARTMENT OF WATER AFFAIRS **Second Respondent**

ELANDSFONTEIN EXPLORATION AND MINING (PTY) LTD **Third Respondent**

RULING ON APPLICATION FOR CONDONATION OF THE LATE NOTING OF APPEAL

APPEARANCES

Corum:	Prof. T. Murombo (Additional Member of Tribunal - Panel Chair)
For the Appellant:	Mr W Anderson with T Bonga (Cullinan and Associates, Cape Town)
For 1st and 2nd Respondent:	No submissions were filed by these parties.
For the 3rd Respondent:	Ms J Truter (Werksmans Incorporated, Johannesburg)
Date:	16 November 2017

INTRODUCTION AND FACTUAL CONTEXT

1. The Appellant is the West Coast Environmental Protection Association ('WCEPA'), an association not for gain duly constituted under the law of South Africa.

2. The first and second respondents are the Minister of Water and Sanitation and the Chief Director, Department of Water Affairs, for the Western Cape provincial. These parties did not file any submission in relation to the condonation application. The first respondent is throughout referred to as the 'responsible authority'.

3. The third respondent is Elandsfontein Exploration and Mining (Pty) Ltd which has since changed its name to Kropz Elandsfontein (Pty) Ltd (hereafter 'Kropz') a private company duly incorporated in terms of the law of South Africa and carrying on the business of exploration and mining.

4. Kropz applied for a prospecting right on 17 June 2010, which was granted on 30 April 2013 on portion 2 and 4 of Elandsfontein Farm 349 in the Malmesbury district ('the mining site') in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA'). Kropz then applied for, and was granted a mining right over this property on 26 November 2014 to mine phosphate.

5. On 22 December 2015, the Saldanha Bay Municipality granted Kropz the land use planning consent in terms of the Land Use Planning Ordinance 15 of 1985 ('LUPO').

6. Kropz applied for an integrated water use licence ('IWULA') on 26 February 2016 in terms of section 41 of the National Water Act, which was granted on 7 April 2017. Kropz also state that it was granted a temporary permission to use water (dewatering mining pit and recharging the aquifer) on 22 December 2016 by the Deputy Director-General: Regulation in the Department of Water and Sanitation.

7. The appellants submitted an objection to the IWULA on 10 February 2017. Once Kropz was been granted the water use licence, the appellants wrote to the first respondent on 21 April 2017 requesting for a copy of the water use licence and reasons for the decision to grant same.[1] The WCEPA only received the reasons for the decision on 24 May 2017 whereupon it lodged an appeal against that decision with the Water Tribunal ('the Tribunal') on 26 June 2017. The appeal papers were served on the third respondent's attorneys on 26 June 2017.

[1] Section 42(4) of the National Water Act requires the responsible authority to promptly 'notify the

8. Kropz argues that the appeal lodged by the appellants on 26 June 2017 at the Tribunal is invalid because it was lodged after the prescribed thirty (30) day period. On the other hand, the appellants argues that its appeal was lodged on time and alternatively, even if it was lodged out of time it has good cause to be granted condonation of the delay in the filing of the appeal. By letter dated 31 August 2017, addressed to the Chairperson of the Tribunal, the appellants applied for such condonation.

9. On 7 November 2017, the Chairperson of the Tribunal allocated this matter to me for urgent determination in terms of Item 6, Schedule 6 of the National Water Act. On the same day, and having perused the documents supplied by the Registrar, I determined that the preliminary matter on condonation could be decided on the papers without a hearing. Nevertheless, to ensure that every party had a reasonable opportunity to present their case,[2] I issued a directive for the parties to file final submissions or head of arguments and any other documents addressing the issues stated below by 10 November 2017. The appellants and Kropz duly filed their final submissions, but no papers were filed by the responsible authority and second respondents.

ISSUES FOR DETERMINATION

[2] Item 6, Schedule 6 (6(3)) to the National Water Act provides that 'The Tribunal must give the appellant or applicant and every party opposing the application or appeal an opportunity to present their case.'

10. The issues for determination in this matter can narrowly be stated as follows:

10.1. Whether or not the appeal to the Tribunal lodged by the appellants was lodged after the expiry of the thirty day period prescribed in section 148 (3) of the National Water Act as read with Rule 4(1) of the Water Tribunal Rules (2005), and

10.2. If the answer to the first issue is in the affirmative, the second issue become whether or not the appellants has shown good reason for the Tribunal to condone such a delay.

LEGAL FRAMEWORK

11. Section 148(3) of the National Water Act provides that,

> '(3) 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.'

This section is repeated verbatim in Rule 4(1) of the Water Tribunal Rules. However, Rule 4 (4) of the Rules also provides that, 'The Tribunal may, for good reason, and on application by any party grant condonation of the late lodging of an appeal or application.'

12. Section 148 (2) of the National Water Act provides that,

> 'An appeal under subsection (1)-
>
> *(a)* does not suspend a directive given under section 19 (3), 20 (4)*(d)* or 53(1); and
>
> *(b)* suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation pending the disposal of the appeal, *unless the Minister directs otherwise*.' *(emphasis added).*

13. Neither the National Water Act nor the Water Tribunal Rules define how the thirty day period should be reckoned.[3] Under the circumstances section 1 and 4 of the Interpretation Act 33 of 1957 become applicable. Section 1 provides that,

> 'The provisions of this Act shall apply to the interpretation of every law in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.'

Whilst section 4 provides that,

> 'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

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[3] In contrast the Rules Regulating the Conduct of the Proceedings of the Magistrates' Court of South Africa General Notice R740 published in *Government Gazette* 33487 of 23 August 2010 (Rule 2(2)) and the Constitutional Court Rules General Notice R1675 published in *Government Gazette* 25643 of 31 October 2003 (Rule 1 definition of "court day") expressly exclude Saturday, Sunday and public holidays from the reckoning of court days.

14. The law regarding whether or not condonation should be granted is settled in South Africa. In *Melane v Santam Insurance Co (Ltd)* 1962 (4) SA 531 (A) the court outlined five factors that must be considered, namely,

    14.1. the degree of delay,

    14.2. the reasons for the delay,

    14.3. the prospects of success of the appeal,

    14.4. prejudice to the respondent and

    14.5. importance of the case.[4]

The court in *Melane* emphasised that any attempt to formulate a rule of thumb should be avoided. These factors are not necessarily cumulative, but they are interrelated, and the court or tribunal has a judicial discretion in deciding whether or not in any given case these factors have been canvassed.[5] A long delay may be atoned for by strong prospects of success where it is in the interests of justice for the issues to be decided by the court and where the prejudice on the respondent is negligible. Similarly, where there are clearly no prospects of success – the reasonableness of the explanation or shortness of the delay may not suffice.

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[4] *Melane v Santam Insurance Co (Ltd)* 1962 (4) SA 531 (A), 532. These were restated by the Water Tribunal in *Hendbrik Sand van Heerden (Pty) Ltd v Minister of Water and Environmental Affairs* WT21/09/2009 para 16 as well as in *Escarpment Environmental Protection Group and Another v Department of Water and Environmental Affairs and Another* WT25/11/2009. See also *Minister of Justice and Constitutional Development v General Public Service Sectoral Bargaining Council and Others* (2017) 38 ILJ 213 para [3] - [4].

[5] *Minister of Justice and Constitutional Development v General Public Service Sectoral Bargaining Council and Others* (2017) 38 ILJ 213 para [3] - [4].

APPELLANT'S SUBMISSIONS

15. The appellants submitted that from the onset they were prevented from effectively and meaningfully participating in the decision-making process around the Kropz IWULA. They submit that, despite filing objections against the IWULA, the responsible authority never notified them of when the decision was taken and the reasons for the decision, until after they had written to request for a copy of the water use licence and the reasons.

16. Once the water use licence was granted on 7 April 2017, the appellants made serious efforts to try to get the documents. This culminated in a letter requesting for a copy of the water use licence and reasons for its granting on 21 April 2017. On 5 May 2017 the appellants's attorneys received a copy of the water use licence from a third party.

17. The appellants further submitted that they only formally received the reasons for the decision from the responsible authority on 24 May 2017, but the water use licence lacked several important supporting documents (annexures) that formed part of the record of decision. The thirty day period begun to run from 25 May 2017 in accordance with section 4 of the Interpretation Act. The appellants argue that section 4 contemplates that any public holidays must be excluded, which means June 16 should be excluded. The appellants also submits that the Registrar of the Tribunal

advised them that if the last day falls on weekend, the Tribunal regards the next business day as the last day to lodge an appeal. In this case, thirty days from 24 May would expire on Saturday, 24 June 2017, making the filing of the appeal on Monday, 26 June 2017 timeous.

18. The appellants further contends that, even if the counting of the thirty days leads to their appeal being out of time by three days, such a delay is very short and not prejudicial to the third respondent. They argue that the appeal raises substantive issues regarding the consideration of the IWULA by the responsible authority ranging from scientific uncertainty and data gaps regarding the impact of Kropz's mining activities on the water resource, to the inadequacy of the mitigation measures proposed for identified impacts. They highlight procedural irregularities including that there was no public participation, in breach of the principles of environmental management in section 2(4) of the National Environmental Management Act 107 of 1998 ('NEMA') and a failure by the responsible authority to properly discharge its functions in terms of section 3 and 27 of the National Water Act and section 24 of the Constitution of South Africa. The latter was caused by the insufficient information submitted as part of the IWULA by Kropz.

19. The appellants notes further that the water use licence was granted despite recommendations against such a decision by the first respondent's internal *National Water Resource Planning Unit* and *Resource Protection Unit*. In

addition, it is averred that the *Groundwater Unit* recommended granting of the licence subject to several conditions most of which were not included in the final water use licence.

20. The lodging of the appeal should have suspended water use activities by Kropz, but Kropz has continued to exercise the water uses in contravention of the National Water Act, says the appellants. They argue that Kropz cannot continue the licenced water uses as section 148(2)(b) of the National Water Act requires them to desist unless they obtain permission from the responsible authority to continue with the water uses pending the hearing of the appeal.

21. The appellants argue further that Kropz is undertaking activities that are listed as requiring environmental authorisation in terms of the NEMA without having applied or being granted such authorization. This is supported by a letter from the Western Cape Department of Environmental Affairs and Development Planning ('DEA & DP') dated 4 March 2016 wherein the department records that Kropz applied for an environmental authorisation on 12 August 2014 but withdrew the application on 3 February 2015. The letter records that the DEA & DP has consistently communicated to Kropz, their predecessors, and the Department of Mineral Resources, that environmental authorisation in terms of the NEMA must be obtained before commencement with any listed activities. The current situation is that Kropz

is undertaking mining activities and other listed activities without the necessary authorisations in some cases.

22. Lastly, the appellants submit that any prejudice that the third respondent may suffer is self-imposed as they continued to invest huge amounts of money in the mine knowing fully well of the several challenges to the authorisations and licences they hold. Any environmental damage consequent upon suspension of the licence was caused Kropz and they cannot rely on those very grounds to substantiate their argument that they will be prejudiced. In any case, argue the appellants, the type of prejudice caused by suspension of the water use licence is irrelevant for purposes of condonation, but a factor to be considered by the responsible authority when Kropz's petition in terms of section 148(2)(b) of the National Water Act is being adjudicated. Rather, Kropz must allege prejudice suffered specifically relating to the two days delay in lodging of the appeal, which it has failed to do.

THIRD RESPONDENT'S SUBMISSIONS

23. For their part the third respondent (Kropz) made the following submissions and attached several documents and expert reports to support their arguments.

24. Kropz submit that the thirty days referred to in section 148 (3) of the National Water Act and Rule 4(1) of the Water Tribunal Rules must be interpreted as referring to 'calendar' days. This interpretation would mean that filing appeal papers on 26 June 2017 having received reason for the decision on 24 May 2017 meant that the appellants' appeal is out of time by three days. The appellants do not explain the three days and they offer no substantiation to their arguments that the appeal carries prospects of success. Kropz therefore argues that, because they view the appeal as being invalid, the provision of section 148(2)(b) National Water Act are not triggered. Nevertheless, out of abundance of caution they petitioned the Minister in terms of the said section on 27 September 2017 and a decision on that petition is still pending. In the meanwhile, the water use activities namely, dewatering of the pit and recharging of the aquifer continue.

25. Furthermore, the appellants only applied for conditional condonation in August 2017 some two months after lodging the appeal. Kropz states that all the respondents never notified them of the appellants' purported appeal.[6] However, the record shows that the notice of appeal was served on Kropz attorneys on 26 June 2017.[7] Despite such service Kropz continued with its water use activities and took it upon itself to decide that the appeal was invalid and therefore to be ignored.

[6] Para 63 Kropz's Submission on Condonation Application.
[7] Page 82 record.

26. Regarding the mining activities, Kropz submitted that the Department of Mineral Resources granted them a mining right on 26 November 2014, and approved their environmental management plan ('EMPR') on 20 February 2015. It is Kropz's view that it is not legally required to obtain any environmental authorisation as their EMPR was approved after an environmental impact assessment study ('EIA') executed under the MPRDA.

27. Kropz avers that on 22 December 2016, five months before it was granted a water use licence, the responsible authority granted it 'temporary permission…to dewater the mining pit and recharge the aquifer downstream in January 2017.'[8] The letter granting such permission is signed by the Deputy Director General: Regulation.[9] The letter does not explain the legal basis on which such temporary permission was granted in view of section 21 and 22(1) - (3) of the National Water Act which prescribe the only circumstances in which a person may use water without a water use licence.

28. It is averred that the IWULA was only granted on the basis of extensive scientific reports that were based on empirical studies. These investigations by experts show that the dewatering and recharging activities will 'have no

[8] Para 58 Kropz's Submission on Condonation Application.
[9] Annexure K5 to Kropz's Submission on Condonation Application.

impacts on the geohydrology of the area, [and] that the aquifer systems will not be impacted significantly and there will be no long-term impacts.' Furthermore, Kropz noted that water use activities approved by the first respondent will cause 'no environmental damage' and that 'any impact on the environment can be prevented or will be adequately mitigated.'[10]

29. Kropz contends that the Department of Water and Sanitation did not act in terms of section 41(4) of the National Water Act to direct a public participation process. Therefore, they did not do a public participation for the IWULA process. However, they opine that the responsible authority possibly regarded the 'extensive public participation in respect of the EIA' for the mining right as being sufficient. By implication this is a concession that no specific public participation was conducted for the IWULA process.

30. It is argues that the appellants approached the wrong fora with their appeal because the recent Water Use Licence Application and Appeal Regulations ('Appeals Regulations') require appeals to be lodged with the Minister and not the Water Tribunal.[11] However, Regulation 3 and 4 of the Appeals Regulations provides that the regulations apply only to integrated water use licences applied for in terms of the regulations. Kropz's IWULA was made in

[10] Para 24-25 Kropz's Submission on Condonation Application.
[11] The Water Use Licence Application and Appeal Regulations General Notice R267 published in *Government Gazette* 40713 of 24 March 2017 (commencement 24 March 2017).

terms of section 41 of the National Water Act before promulgation of the Appeals Regulations.[12]

31. It is further argued that granting condonation to the appellants will cause prejudice to Kropz because they have invested heavily in the mine, and there are water uses that cannot be stopped without causing significant environmental damage. Kropz argue, therefore, that allowing the appellants' appeal to stand will disrupt the dewatering of the mine pit and recharging of the aquifer with consequences for the environment.[13] Allowing the appeal will also impact the employees already employed by Kropz thereby causing them economic prejudice and inconvenience.

ANALYSIS AND FINDINGS

The reckoning of days

32. The submissions by both parties to this matter show that the Interpretation Act should be used in deciding whether or not the thirty-day period prescribed in terms of the National Water Act and the Water Tribunal Rules includes or excludes weekends and public holidays. In accordance with section 4 of the Interpretation Act, 24 May 2017 should be excluded from the period of reckoning days. If we count the thirty days from 25 May 2017, it shows that the Appellants delayed by two days in lodging their appeal to the Tribunal. The date 25 May 2017 is relevant because it is the date on

[12] This is confirmed by the first respondent on page 100 of the Record (Affidavit of the Chief Director, Legal Services).
[13] Annexure K2 to Kropz's Submission on Condonation Application. (Botha report)

which the Appellants received the reasons for the decision to grant the water use licence.

33. The appellants lodged and served the notice of appeal and grounds of appeal on 26 June 2017, which means the 26th itself cannot be included in the period of delay. The two day delay was over Saturday 24 and Sunday 25 June 2017. It is accepted and confirmed by the Registrar of the Tribunal that the Registrar's offices are closed on Saturdays and Sundays. It is therefore difficult to see what difference the two days over a weekend would make in the prosecution of the appeal. In other words, the delay of two weekend days is insignificant.[14]

34. Apart from the fact that the delay of two days is negligible and fell over a weekend during which none of the parties or the responsible authority would have been able to take any action to prosecute the appeal, the Tribunal finds that the short delay is therefore insignificant from the perspective purely of the number of days or length of the delay.

Has the Appellant proffered a reasonable explanation for the delay?

[14] Longer delays have been condoned in similar cases by the Tribunal and the courts, see *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) and *Hendrik Sand van Heerden (Pty) Ltd v Minister of Water and Environmental Affairs* WT21/09/2009 where a delay of 312 days was condoned.

35. While the two day delay is explicable, the Appellants have not put forward a cogent explanation as to why they failed to lodge their appeal between the 25 of May 2017 and 23 June 2017. The submission by the Appellants focused mostly on the fact that they struggled to get copies of the water use licence and reasons for the decision. Once they were availed of these documents there is no justification as to why it took them over 32 days to lodge the appeal papers. There is the underlying argument by the Appellants that the documents provided by the responsible authority remain incomplete in that several annexures and documents on the basis of which the decision of the responsible authority was made have not been made available. Overall, the length of the delay together with the prospects of success discussed below, atones for the lack of a strong explanation by the appellants of their inaction from 24 May 2017 to 23 June 2017.

Does the appeal carry some prospects of success?

36. This criterion does not require the Tribunal to make a finding on the merits of the appeal as such. Rather, the approach is that upon assessing the grounds of appeal, the Tribunal should be able to conclude that, although open to some doubt the grounds of appeal advance arguments that *prima facie* disclose a challenge that carries some prospects of success. The appellants raise both procedural and substantive grounds of appeal:

36.1. Firstly, the appellants substantively challenge the basis on which the water use licence was granted. In particular, they submit that the proposal by Kropz to obtain 1,6 million litres of water from the Saldanha Bay Municipality is unsustainable given the water scarcity in the area concerned.

36.2. Secondly, the appellants argue that two of the first respondent's internal expert units recommended against the granting of the water use licence. These are the National Water Resource Planning Unit and the Resource Protection Unit. Another internal unit, the Groundwater Unit recommended that the licence be issued but subject to several conditions most of which the first respondent failed to include in Kropz's water use licence. A decision inconsistent with the Record of Recommendations which contains assessments and evaluations of the IWULA by the responsible authority's specialist units is *prima facie* challengeable on appeal.

36.3. Thirdly, together with the failure to be guided by specialist recommendations noted above, the appellants demonstrate a *prima facie* failure by the responsible authority to act in accordance with section 3 and 27 of the National Water Act, and principles in section 2(4) of the NEMA, provisions that implement section 24 of the Constitution. More specifically, the submissions by the appellants

demonstrate that the scientific expert evidence and reports before the responsible authority are open to expert challenge and the appellants have placed before the Tribunal expert reports showing possible gaps and uncertainties in the information and data that was presented to the responsible authority. A pointed averment is made by the appellants that in view of the uncertainty and gaps in the understanding of the impacts of Kropz's mining activities on the water resource and the possible ineffectiveness of the proposed mitigation measures, the responsible authority was supposed to apply the precautionary principle and err on the side of caution. This could have been done by declining to the IWULA or allowing the appellants to place before it more information.

36.4. Kropz on the other hand argue that appellant's expert studies and reports are theoretical and not based on field studies. They further submit that Kropz commissioned studies that showed that 'the dewatering of the mining site and recharge of that water is anticipated *to have no impact* on the geohydrology of the area…' Kropz further claim that their experts found 'that *no environmental damage* would result from the water use activities (dewatering and recharging of the aquifer) and that 'any impact on the environment can be prevented or will be adequately mitigated.' The claims of 'no impact' or 'no environmental damage' appear on the face of it to be

unrealistic and in view of the appellant's arguments should be subjected to further analysis which can only happen in a proper appeal hearing.

36.5. Kropz further argues that allowing the appeal to stand would suspend the water use licence and lead to more environmental damage as the dewatering and recharging would have to be stopped. The appellants correctly retorted that, Kropz who started the mining process and the water use activities even before they had a water use licence created this problem.[15] The temporary permission referred to by Kropz as having been granted by the responsible authority appears to be questionable as only a water use licence or general authorisation allows a person to use water.[16]

36.6. Apart from the fact that Kropz created the necessity for dewatering and recharging of the aquifer, there are other lawful avenues available to prevent the appeal from disrupting the water use

[15] Para 106 Kropz Final Submissions.

[16] Para 28 and 58 Kropz Final Submissions. There is no provision in the National Water Act empowering the Deputy Director General: Regulation to grant a temporary consent to a water use outside the provisions of section 22, 39 and 40 of the Act. Section 22 (1) provides that,
'A person *may only use water* –
(a) without a licence –
(i) if that water use is permissible under Schedule 1;
(ii) if that water use is permissible as a continuation of an existing lawful use; or
(iii) if that water use is permissible in terms of a general authorisation issued under section 39;
(b) if the water use is authorised by a licence under this Act; or
(*c)* if the responsible authority has dispensed with a licence requirement under subsection (3)'
There is no mention of a 'temporary consent' in the Act and Annexure K5 to Kropz Final Submissions does not indicate in terms of which legal provision was the Deputy Director-General: Regulation acting.

activities currently taking place to protect the environment. Kropz can, and has, petitioned the responsible authority to uplift the suspension of its water use licence pending the hearing of the appeal. That petition was filed on 27 September 2017 but the responsible authority has not yet made a decision thereon.[17]

36.7. The responsible authority can act in terms of section 19[18] and 20 of the National Water Act to ensure that Kropz continue to take reasonable measures to prevent water pollution arising from their mining activities. In addition, Kropz are under a legal obligation in terms of section 28 of the NEMA to take reasonable measures to prevent environmental degradation that is caused by their activities on the property concerned. These provisions adequately create obligations that enables the appeal to be heard whilst the environment is protected. It is up to the responsible authority to act in

[17] Para 97 - 98 Kropz Final Submissions. See also section 148 (2) (b) National Water Act.

[18] Section 19 of the National Water Act provides that

'(1) An owner of land, a person in control of land or a person who occupies or uses the land on which –

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to-

(a) cease, modify or control any act or process causing the pollution;

(b) comply with any prescribed waste standard or management practice;

(c) contain or prevent the movement of pollutants;

(d) eliminate any source of the pollution;

(e) remedy the effects of the pollution; and

(f) remedy the effects of any disturbance to the bed and banks of a watercourse.'

terms of the sections referred to protect the water resources and the environment.

36.8. Above all, Kropz have a constitutional obligation to prevent pollution and environmental degradation in terms of section 24 (b) of the Constitution. This constitutional obligation remains binding whether or not the appeal is allowed to stand.

37. Without dealing in detail with all the substantive arguments and evidence submitted by the appellants, the Tribunal finds that although such arguments, expert evidence and reports may be open to some doubt, they disclose a *prima facie* basis to challenge the decision to grant the water use licence.

38. With regards to procedural grounds of appeal, the appellants argue that the process leading to the granting of the water use licence did not provide them, as interested and affected parties and objectors, a sufficient opportunity to participate in the decision making process. They argue that it was a challenge to obtain meaningful information about the IWULA and progress from the first respondent. This allegation that there was no public participation can be joined together with the submission by the appellants that the respondents failed to act in accordance with the principles of environmental management in section 2 (4) of the NEMA.

39. Kropz do not deny that there was no public participation, but claim that the public participation process it conducted during the environmental impact assessment process under the MPRDA sufficed for purposes of the IWULA.[19] This would be the case where the two processes were integrated in terms of section 45(5) of the National Water Act and where the responsible authority has directed that such a previous public participation process is sufficient.

40. Kropz argue that section 41(4) of the National Water Act provides that public participation should only be done when the responsible authority has issued a directive to that effect. The responsible authority did not issue such a directive and thus Kropz argues it was not bound to conduct the process.[20] Consequently, Kropz assert that the appellants do not have *locus standi* to mount the appeal. The High court has since clarified that this interpretation of section 41(4) and 148(1)(f) of the National Water Act is absurd an arbitrary.[21] Public participation is an essential element of fair environmental decision-making. It is noted that Kropz is refusing to apply for an environmental authorisation a matter subject to separate proceedings. All these factors raise *prima facie* challenges against the granting of the water use licence that may very well succeed on appeal.

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[19] Para 93.1 - 93.2 Kropz Final Submissions.
[20] Para 56 Kropz Final Submissions.
[21] See *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) para [44] *et seq*.

Prejudice to the respondents

41. As indicated above it is clear that any prejudice that Kropz may suffer is a result of its decision to proceed with the mining activities without properly securing all authorisations required by law. Kropz has created the necessity for the dewatering of the mine pit and recharging of the aquifer and cannot use that as a basis to prevent the appellant from appealing against the decision by the responsible authority to grant the water use licence. Any investment made by Kropz was a result of it taking a business risk knowing full well of the objections that had been lodged by the appellants against the IWULA.

42. Prejudice in the form of environmental damage can be remedied in terms of the provisions of the National Water Act and the NEMA referred to above. These provisions, variously, enable the responsible authority or other environmental authorities to take measures and issue directives to ensure that any dewatering of the mining pit and recharging of the aquifer that is necessary continues. That this can be costly to Kropz is not a decisive factor at this stage of the matter and can be fully addressed in the hearing of the appeal.

43. These grounds of appeal advanced by the appellants raise important and legitimate issues[22] that require clarity and final determination by the Tribunal to provide appropriate guidance on how the responsible authority should implement section 27 and 41 of the National Water Act.

44. It is the mandate of the Tribunal to decide whether or not the appellants' appeal is out of time, and Kropz cannot legally make that decision and act as if there is no appeal contrary to section 148(2)(b) of the national Water Act.

DECISION

45. In view of all of the above considerations, the Tribunal decides that:

    45.1. The appeal by the appellants was filed out of time by two days, which two days fell on a Saturday and a Sunday when the Registrar's office is closed.

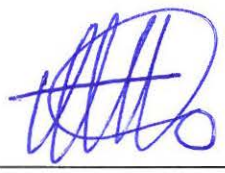
    45.2. There is an acceptable reasonable explanation for the insignificant two day delay in lodging the appeal.

[22] see *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR 2700 (GNP) para [50] and [65].

45.3. The grounds of appeal advanced by the appellants, though open to some doubt, are bona fide and raise a *prima facie* case that carries some prospects of success. The appellants have thus shown good cause why condonation should be granted.

45.4. The delay in filing the appeal by the appellant be and is condoned and the appeal so lodged on 26 June 2017 is pending before the Water Tribunal.

HANDED DOWN AT PRETORIA ON THE 20th OF NOVEMBER 2017



Prof Tumai Murombo

Additional Member, Water Tribunal