

SOUTH AFRICA / JUDGMENT

Butt v The Director-General Department of Water And Sanitation and Others

(WT06/17/GP) [2021] ZAWT 5 (2 August 2021)

[2021] ZAWT 5

COURT
Water Tribunal

BEFORE
M.R. Mokgalabone, U.N. Mbeki

CASE / FILE NUMBER
WT06/17/GP

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IN
THE WATER TRIBUNAL
HELD
VIRTUALLY VIA AN ONLINE PLATFORM
Case
Number: WT06/17/GP
In

the Appeal of:

RICHARD
FAIRFAX
BUTT Appellant
And
THE
DIRECTOR-GENERAL: DEPARTMENT OF
WATER
AND
SANITATION First
Respondent
BREEDE-GOURITZ
CMA Second
Respondent
LEMOENSHOEK
PLASE (PTY) LTD Third
Respondent
RULING-LOCUS
STANDI / JURISDICTION
INTRODUCTION
1
From the outset, it is important to state that

based on the documents submitted by the Appellant, in terms of section 148(1)(f) of the National Water Act of 1998 (hereafter referred to as the NWA) it is clear that this is an appeal against a section 33 declaration which was made by the First Respondent in terms of the NWA. On the basis of the papers lodged by the Appellant, there is no doubt that this is a matter that falls within the scope and ambit of the Water Tribunal. The Water Tribunal has jurisdiction over this matter. It is important to clarify this point right at the beginning of his judgment, due to the argument advanced by the Third Respondent that the Water Tribunal does not have jurisdiction to adjudicate over this matter. The reasons for ruling that the Water Tribunal has jurisdiction in this matter will be made clear below.

2

The First and Second Respondent contend that the Appellant does not have locus standi to prosecute his appeal in the Water Tribunal, whilst the Third Respondent argues that the Water Tribunal does not have jurisdiction to adjudicate over this matter.

3

All the parties made submissions with regard to the preliminary point, which is before the Water Tribunal, namely: whether the Appellant has locus standi and whether the Water Tribunal has jurisdiction to adjudicate over this matter.

ISSUES

TO BE DECIDED BY THE WATER TRIBUNAL

4

The Water Tribunal is required to decide the

on the following issues:

4.1

Whether the Water Tribunal has jurisdiction to adjudicate over his matter.

4.2

Whether the Appellant has jurisdiction to lodge and prosecute an appeal in the Water Tribunal in terms of section 148(1) (f), against a section 33 declaration granted by the First Respondent in favour of the Third Respondent or not.

5

The issue of 'condonation' of the late filing of the

appeal was deferred, by consent between all the parties, pending the determination of the issue of jurisdiction and locus standi. The

parties also agreed should the Appellant not succeed with either the jurisdictional or locus standi matters, then it will be end of the matter or the Appellant may exercise its right to pursue the case in High Court,

SUBMISSIONS

BY THE PARTIES

The

Appellant's case

6

This is an appeal lodged by the Appellant in terms of section 148(1)

of the National Water Act of 1998 (NWA). The appeal is lodged by the decision of the First Respondent to issue a section 33 declaration to the Third Respondent of the 15 April 2002, which declaration authorised the abstraction of water by the Third Respondent from the During River.

7

The Appellant relies on three key arguments for asserting that the

Tribunal has jurisdiction to hear this matter, namely:

7.1

The Appellant is entitled to lodge an appeal, even though he did not object in terms of section 41 of the NWA.

7.2

The Appellant is acting in the public interest,

7.3

The decision of the First Respondent in granting the section 33(3) (a) declaration had the effect of a transfer of water use rights.

8

The Appellant contends that there is no requirement in law that the appeal must be lodged by someone who has lodged an objection, especially when the First Respondent has not complied with section 41 of the NWA by inviting interested parties to object.

9

The Appellant submits that even though the Appellant is not an 'objector' as envisaged in section 41 of the NWA, the Appellant is an interested party in the matter and therefore entitled to lodge and prosecute this appeal in the Water Tribunal.

10

The Appellant contended that the argument that only people who have

objected can lodge an appeal, that would lead to a situation where decisions of the First Respondent are not challenged. Section 148(1)

(f) of the NWA is conditional to section 41 of the NWA, having been complied with by the First Respondent.

11

The Appellant referred to annexure A, which showed depiction of the geographic layout of the area in question, where the Appellant's, Third Respondent's and one Mr. Willemse are located.

The

depiction also show the Lemoenshoek River and the Doring River.

12

The Appellant indicated that the decision of the First Respondent has

had the effect of negatively affecting the environmental integrity in the area, as shown in page 677 of the bundle. The area in question is

an environmentally sensitive area. The Appellant contends that the water use has led to environmental degradation in the area and the

drying of rivers and further stated that the First Respondent's decision has constitutional implications.

13

The

Appellant relied heavily of the case of Escarpment

Environmental Protection
Group and Another v
Director General:

Department of Water and Sanitation and Another[1]
(hereafter

referred to as the Escarpment case/ judgement) and indicated the said case has in effect overturned nine cases of the Water Tribunal.

14

The Appellant argued that the First Respondent has not complied with Section 41 of the NWA and for that very reason, the Appellant is not required by law to have lodged an objection, in order to be entitled

to appeal the decision of the First Respondent in the Water Tribunal.

15

The

Appellant contended that in the previous dispensation before the Escarpment Case, the First Respondent did not comply with section 41

of the NWA of the Act and further, that an objection has to be filed by an objector pursuant to section 41 of the NWA issued to the

objector by the First Respondent. The Appellant referred to the case of Ndimeni

v Meeg Bank Ltd (Bank of Transkei)[2],

the Court indicated that when interpreting a statute, one has to take into account the context.

16

In the case

of Werda

Handel (Pty) Ltd and Another v Director General: Department of Water and Sanitation and Another,[3]

the

Appellant argued that there was no section 41 process, at all.

17

The Appellants argued further that the Courts have adopted a liberal approach when it comes to the interpretation of statutes and the Water Tribunal is bound to follow the principles laid down by

the

High Court. Persons who did not object, because the Department did not follow section 41 of the NWA are entitled to appeal

to the Water

Tribunal against a decision of the First Respondent. One cannot be precluded from appealing for the mere fact that

they did not object.

18

In another Escarpment case, the Court held that while interpreting legislation, it is proper for the interpreter to 'read in the necessary inference' into the relevant section of the legislation.

19

The Appellant asked what is the public participation process envisaged

by section 41 of the NWA and referred to the circumstances of Mr. Willemse. It would be unconstitutional to exclude a person like

Willemse to appeal.

20

The

Appellant conceded that there are other alternatives to lodging an appeal at the Water Tribunal, such as approaching the High Court with

a review application, on the basis of the Promotion of Administrative Justice Act[4]

(hereafter PAJA), but contended that denying members of the public access to the Water Tribunal is not constitutional, especially because the Water Tribunal is a specialised Forum with experts and parties cannot be excluded from accessing the Tribunal merely because

there is a remedy of a review in the High Court.

21

The

Appellant contends that their case is essentially a constitutional law argument. Access to the Court must not be denied to the members

of the public, as provided for in section 39 of the Constitution of the Republic of South Africa[5]

(hereafter

referred to as the Constitution).

22

According to the Appellant where there is more than one interpretation of a section of a statute, the Court or a Tribunal must adopt an interpretation which promotes constitutional principles. The Court has cautioned, that in the course of interpretation of statutes, Courts and Tribunals must avoid being too textual or legalistic and further argued that the Third Respondent's approach to interpretation is too textual and legalistic, by stating that the Appellant did not lodge an objection in terms of section 41 of the NWA and therefore should be precluded from lodging an appeal at the Water Tribunal. The Constitution of the Republic is the starting point and it permeates all law, including legislation. The Constitution, in particular sections 33 and 34, deal with administrative justice and access to the Courts, respectively.

23

The purposive approach to interpretation, in the case of the National Water Act is required. The purpose of the National Water Act is to protect the country's water resources. The Appellant referred to paragraphs 8, 11 and 12 of the Escarpment case.

24

The Appellant contends that the Constitution is the supreme of the Republic and permeates all law, including legislation, including the NWA.

25

Section 33 of PAJA deals with administrative justice, while on the other hand section 34 of PAJA deals with access to the Courts. Any decision on locus standi must take into account sections 33 and 34 of PAJA

26

It is important that when interpreting any law regard must always be given to the bill of rights. The Appellant referred to paragraph 16 of the Escarpment judgement.

27

Upstream property owners such as the Appellant have first rights to the water. The approach should be different.

28

The Appellant contends that according to the National Environmental Management Act[6] (hereafter referred to as NEMA), at section 2 and the guidelines, established principles for decision making when it comes to matters affecting the environment. The Appellant seeks to protect the environment as provided for in NEMA and he should therefore be allowed

to lodge his
appeal at the Water Tribunal.

29

The Appellant does concede that indeed he did not file an objection in terms of section 41 of the NWA. The Appellant referred to page 13 of the Escarpment judgment. The Appellant asked the question as to

what does the law say about water use licenses which are issued without inviting the public to participate, as required by section 41

of the NWA. The First Respondent, according to the Appellant failed, in this case to comply with section 41 of the NWA,

in that there was

no public participation and therefore, why must the Appellant be precluded from lodging an appeal against the decision of the First

Respondent. Even if public participation was invited, through the media, some members of the public have

no access to the media, such

as radio and newspapers. The Appellant referred to paragraph 40 of the Escarpment judgment in his regard.

30

Even though the Appellant has the option to approach the High Court for review of the First Respondent's decision, the Water Tribunal does have jurisdiction to adjudicate over the Appellant's appeal. The key principle laid down in the Escarpment case is that the Legislature did not intend the NWA to operate in an arbitrary fashion, where members of the public who are not given notice by the first Respondent, in terms of section 41 of the NWA, are subsequently precluded from lodging appeals at the Water Tribunal.

31

The Appellant contends that the previous owners were not invited to participate in the process before the First Respondent made the decision, as required by section 41 of the NWA.

32

The Appellant further argued that the Courts, as a general principle do not give effect to absurd results, which result from legislation.

In this regard the Appellant referred to section 148(1)(f) and

asserted that all what is required, on the part of the Water Tribunal to determine this preliminary point, is to read the necessary inference into section 41 of the NWA.

33

The Appellant referred to section 25 of the National Water Act, which

provides that:

“Transfer of water use authorisations 25. (1) A water management institution may, at the request of a person authorised to use water for irrigation under this Act, allow that person on a temporary basis and on such conditions as the water management institution may determine, to use some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose. (2) A person holding an entitlement to use water from a water resource in respect of any land may surrender that entitlement or part of that entitlement - (a) in order to facilitate a particular licence application under section 41 for the use of water from the same resource in respect of other land; and (b) on condition that the surrender only becomes effective if and when such application is granted. (3) The annual report of a water management institution or a responsible authority, as the case may be, must, in addition to any other information required under this Act, contain details in respect of every permission granted under subsection (1) or every application granted under subsection (2).”

34

The Appellant further argues that the decision of the First Respondent, even though not intended, has had the effect of the transfer of a water use license. Such an effect might not have been intended by the First Respondent, however, the transfer of a water use license is the resultant consequence.

35

There is an ensuing degradation of the environment which is currently taking place, around the area in question and that entitles the Water Tribunal to adjudicate over the matter and make the necessary decision. In that regard, the Water Tribunal does have jurisdiction to hear the appeal brought by the Appellant to the Water Tribunal.

36

The Appellant states that the decision of the First Respondent did not take into account the volume of water to be used. In this regard, the Appellant referred to page 16 of WTA. At pages 18, 19 and 20 of the bundle it is clear that there is no reference to the volume of water to be used by the Third Respondent.

First and Second Respondent’s submissions

37

The First and Second Respondents submitted that the Appellant is

interpreting and using the decision in the Escarpment case incorrectly and referred the Tribunal to paragraph 36 of the judgment.

The Court dealt with the question of ‘who is an objector?’ as envisaged in the NWA and the Court followed a purposive approach, in determining the question of ‘who is an objector?’ The legislature did not intend that the Water Tribunal

must entertain appeals from someone who has not objected in terms of section 41 of the NWA. To allow someone who has not objected to lodge an appeal would be to interfere with the work of the Legislature, on the part of the Water Tribunal and to deviate from the very intention of the Legislature, with regard to section 41 of the NWA.

38

It is clear from section 41 of the NWA that the Legislature intended to limit the categories of Appellants to the Water Tribunal.

39

The Appellant still has legal recourse outside of the Water Tribunal. The Appellant may approach the High Court and lodge a review application against the decision of the First Respondent or to challenge the validity of the legislation itself.

40

The Tribunal must not construe purposive interpretation as reading something that is not there in the legislation or intended by the Legislature. By accepting the Appellant’s interpretation, that

the Appellant is entitled to appeal, despite not having lodged an objection in terms of section 41 of the NWA would imply that any

person can lodge an appeal, whether one has lodged an objection, in terms of section 41 of the NWA, or not.

41

The First and Second Respondent assert that it is common cause that the Appellant did not lodge an objection, in terms of section 41 of the NWA. It is also common cause that the previous owners, the

Hofmeyer family, did not lodge an objection. Despite not having lodged an objection, the Appellant seeks to appeal against a

declaration, which was granted by the First Respondent, 15 years after the said decision was made. Despite not having lodged an

objection, in terms of section 41 of the NWA, the Appellant’s problems are compounded by the fact that the Appellant was not the

owner of the property at the time the decision was made. The argument by the Appellant that the First Respondent did not invite the public

to participate in the process, before the decision was made, does not assist the Appellant very much.

42

The Water Tribunal is a creature of statute and can only do what it is authorised to do, by the relevant statute. If it is not authorised by the relevant statute, the Water Tribunal cannot claim it.

43

The First and Second Respondent contend that the Escarpment case did not overrule the principle, which says: 'only an objector can lodge an appeal'.

44

The First and Second Respondent drew a distinction between the period before and after the Escarpment case. Before the Escarpment case, not all objectors were entitled to appeal. It was only those objectors

who have been invited by the First Respondent, to object, who were entitled to lodge an appeal to the Water Tribunal.

After the

Escarpment case, 'any objector' who lodged an objection timeously, is entitled to lodge an appeal at the Water Tribunal. The First and Second Respondent contend that, that is the

only difference between the period before and after the Escarpment case. Put differently, that is the

only difference between the

decision of the Water Tribunal and that of the High Court, with regard to the Escarpment case.

45

The First and Second Respondents argued that it would be incorrect, for the Water Tribunal to broaden the meaning of section 148(1) (f) of the National Water Act. The High Court, in the Escarpment case did not broaden the language and meaning of section 148(1) (f), but merely interpreted it.

46

It was the intention of the Legislature to limit the categories of Appellants who are entitled to appeal to the Water Tribunal. The NWA, as well as the Escarpment case are very clear in stating that,

only those who have lodged an objection 'timeously' may object. Should this principle not be followed, one would have a

situation where persons, who have not objected timeously, lodge appeals at the Water Tribunal after 10 years or even 20 years after

the decision has been made by the First Respondent. Agreeing with the Appellant, would be equivalent to saying that the Legislature is

wrong, with regard to its intentions regarding sections 41 and 148(1) (f) of the NWA. The Appellant still does have legal recourse, even if he is not allowed to proceed with his appeal in the Water

Tribunal,
by approaching the Courts to seek an order, which would render
section 148(1) (f) invalid.

47

The First and Second Respondents contend that the question whether
sections 41 and 148(1) (f) are constitutional or not, is irrelevant
for the purposes of this present case, at this stage. What the Water
Tribunal is
required to do in the current case is just to interpret
the relevant sections of the NWA. The Court in the Werda case,
which was decided after the Escarpment case, at paragraph 23 of the
First and Second Respondent's heads of argument, acknowledged
that section 148(1)(f) is broad enough to include 'all persons
who lodged an objection on time'. Should the Water Tribunal
have a liberal
interpretation of section 148(1)(f) of the National
Water Act, that would have the effect of opening the flood gates of
appeals to the Water Tribunal.

48

The First and Second Respondents argue that any person, which
includes
the Appellant in this case, who has not lodged an objection
in terms of section 41 of the NWA, is not an objector, as envisaged
by the said legislation. An objector can only be a person who has
lodged an objection
timeously, either by invitation or without an
invitation. By opening, the interpretation of section 41 of the NWA,
to include limitless categories of persons to be entitled to lodge an
appeal at the Water Tribunal, would be equivalent
to changing the
original intention of the Legislature.

49

The First and Second Respondents contend that once the Water
Tribunal,
in this case, finds that the Appellant has no locus
standi, consequently the Water Tribunal lacks jurisdiction to
adjudicate over this case.

50

With regard to the Appellant's submissions with regard to
section 25 of the NWA, the First and Second Respondents stated that
they battled to follow the logic of the Appellant's argument.

51

The First and Second Respondents contend that the Appellant's
assertion that the decision or declaration made by the First
Respondent has had the effect of a transfer of water use
rights is not correct, as the Third Respondent was rightfully
granted the declaration. There has not been a transfer of
water use rights. There is no merit in the Appellant's argument
that the section 33 declaration made by the First Respondent has
resulted in the transfer of water use rights in favour of the Third
Respondent. The

expert, who came to the conclusion that the section 33 declaration by the First Respondent has had the effect of transfer of water use rights, the First and Second Respondents assert that the said expert is not before the Water Tribunal and therefore such conclusion must not be given any weight, for purposes of this present case, as it is not clear as to how such conclusion were arrived at.

52

With regard to the Appellant's contentions regarding section 25(1), the Appellant may approach the High Court, in terms of PAJA, for the review and setting aside of the decision of the First Respondent.

53

The First and the Second Respondent pray for the dismissal of the Appellant's appeal, on the basis of his lack of locus standi.

Third

Respondent's submissions

54

The Third Respondents contends that the Water Tribunal does not have jurisdiction to adjudicate over this matter, as it has been argued in the Third Respondent's heads of argument and supplementary heads of argument.

55

According to the Third Respondent, jurisdiction originates from the papers, which are filed by the Appellant, namely; the notice of appeal, affidavit and annexures. One cannot impose jurisdiction on a

forum that lacks jurisdiction by merely claiming to have a good case.

Jurisdiction is a matter of law, it is a particular

forum either has

or does not have jurisdiction.

56

The Third Respondent submits that the issue of jurisdiction must be determined first, before the issue of locus standi can even be looked at.

57

The Appellant tries to present the merits of the case to the Water Tribunal, even before the Water Tribunal could determine the issue of jurisdiction.

58

Section 146 of the National Water Act deals with the establishment of the Water Tribunal. As a creature of statute and the scope of its powers is confined to the provisions of the statute.

59

The Third Respondent contended that the Water Tribunal is not a Court of law and therefore is not entitled to enquire into constitutional issues. In this regard, the Third Respondent referred to section

170

of the Constitution and stated that it is only the High Courts are

entitled to deal with constitutional issues and not the lower courts, including all tribunals such as the Water Tribunal. The Third respondent stated that the Water Tribunal could only exercise administrative powers conferred to it by statute and not judicial powers. The Tribunal just like the Magistrate's Courts are creatures of statute and they operate within the four corners of the statute. Even a Regional Court, which is an intermediary between the High Court and the lower courts, cannot adjudicate over constitutional issues.

60

The Third Respondent submitted that it is common cause that the section 33 declaration that was made by the First Respondent is the target of the appeal brought by the Appellant. It is settled law that the conditions of section 41 of NWA have to be met before an appeal can be heard by the Water Tribunal. There must be an objection, which must be lodged timeously before the Water Tribunal can hear an appeal.

61

The previous owners of the property, the Hofmeyer family did not lodge an objection and the Appellant only emerges on the scene many years later, after the section the First Respondent made 33 declaration. The Third Respondent referred to pages 886 to 887 of Hofmeyer's statements, which were made after the Appellant started making allegations about the unlawful use of water. According to the Appellant, Lemoenshoek Dam, which was built by the Third Respondent's predecessor in title, must be removed. Lemoenshoek Dam is an 'in stream dam. On page 888, there is a statement, which was made after the Appellant alleged that Lemoenshoek Dam is illegal. The Appellant's allegations about the illegality of the Lemoenshoek Dam culminated in a court case, brought by the Appellant against the Third Respondent and the Appellant lost the said case.

62

The Appellant is of the view that Lemoenshoek Dam must feed the two rivers, namely: Lemoenshoek River and Doring River. The Appellant expects the Third Respondent to release water, which has already been collected by the Third Respondent. The Appellant wants the Lemoenshoek Dam to be removed, so that the water can be released into the two rivers. The Doring River is the main river, while the

Lemoenshoek River is the minor one and that is why the Reserve Determination was only published in relation to the Doring River and not the Lemoenshoek River. The said declaration mentions the Doring

River and not the Lemoenshoek River. Reference to the Doring River in the declaration, also refers to the Lemoenshoek River.

63

The NWA recognises all lawful water use rights, which existed before it came into operation. The storage of water in the Lemoenshoek Dam has nothing to do with the section 33 declaration, under consideration.

This appeal by the Appellant does not affect the storage of water. There is no provision in the NWA which requires the lawful water user to reduce his water use.

64

With regard to the issue of interpretation of section 41 of the NWA, the Third Respondent contends that it is not correct to speculate about the intention of the legislature. The Courts must not rewrite statutes.

65

The Third Respondent went on to deal with the issue of ‘who is

an objector’ in relation to the Escarpment case. The Third Respondent distinguishes between an objector in a narrow or limited

sense, being an objector who has been invited and an objector in a broader sense, being an objector who has not been invited.

The Court

is paragraph 6 of the Escarpment case (issue to be decided) stated that, it is common cause people who cannot read or write

(illiterate). The Courts have decided that the objector must have objected in writing and further that the objection must be timeous.

The purpose of section 41 of the NWA was to limit the class of Appellants who are entitled to lodge an appeal at the Water Tribunal.

That was intentional. The Courts have also dealt with the issue of what is the meaning of “timeous”

and referred to the

Werda case, where the principle that ‘an objector cannot be a limitless class of people.

66

In the KPMG case, the Court held that interpretation is a matter of law and not of fact. No private person can tell a Court of law what ‘is the law’, as one can only express an opinion of ‘what

law is’. The Courts have a final say, by making legal pronouncements. Even a retired judge cannot make legal pronouncements, only a Court of law can do so.

67

The Third Respondent stated that the Appellant's assertion that section 148(1) of the NWA could only apply when the First Respondent has followed section 41 of the NWA. It appears, as though the Appellant wants the Water Tribunal to change the reading of section 148(1) (f) and the law does not allow that. The Third Respondent also made a distinction between a 'reading in' and a 'reading down' and further stated that the High Court and the Constitutional Court can resort to 'reading in' or 'reading down', however the Water Tribunal, as a creature of statute cannot resort to that. A 'reading in' or 'reading out' is a constitutional remedy which is invoked after a statute or legislation is found to be constitutionally invalid, after a section or entire legislation is struck down. The Water Tribunal cannot add words to the any Act or legislation. Section 148(1) (f) has not been struck down by the High Court or the Constitutional Court and therefore, there is no legal basis for a 'reading in' or 'reading down'.

68

The Third Respondent argued that the Escarpment case does not cancel the two requirements of section 41 of the NWA, namely that there must be a written objection and further that such objection must be timeous. The case of Nicolas Shea, at paragraph 22, the Water Tribunal held that water use rights are not temporary in nature, as there is a guarantee of long term, if not indefinite rights of water usage.

69

The Appellant was not the owner of the property in question at the time when the decision, which is the subject matter of this appeal, was made and therefore the Appellant is not an affected party and the Appellant is not entitled to lodge a complaint on behalf of Mr. Willense who is downstream from him. The Third Respondent further stated that even Mr. Willemse himself did not lodge an objection in terms of section 41 of the NWA. The fact that an appeal comes to the Water Tribunal under the guise of protecting the environment cannot supersede section 41 of the NWA. An appeal is a re- hearing of 'second instance'. There must have been an unsuccessful

appellant. In this case, there was no hearing of first instance and the question then becomes, what the Appellant is appealing against. The Appellant is a late comer and the previous owner of the property did not object. One cannot have more rights, than previously or originally had.

70

The Third Respondent contended that should the Water Tribunal agree with the Appellant in this case, that would allow appeals from people who brought properties many years ago and were aggrieved by the various decisions of the First Respondent. That would open the floodgates of appeals to the Water Tribunal and that would be unsustainable.

71

The Appellant does not even have the option of approaching the High Court for a review in terms of PAJA, as such, a review must be brought to the High Court at least 180 days after the decision has been made. Even appeals to the Water Tribunal have to be brought 30 days after the decision has been made.

72

At the time of purchasing the property, the Appellant knew exactly which rights came with the said property and may not seek to create new rights for himself, which did not exist when the Appellant bought the property.

73

The Third Respondent therefore seeks relief to the effect that, the matter be struck off from the roll, as the Water Tribunal does not have the authority to deal with this matter.

Appellant's submissions in reply to the submissions of the Respondents

74

The Appellant submitted that section 39 of the Constitution compels the Water Tribunal to interpret legislation.

75

The Water Tribunal, even though it is not a Court of law is entitled to interpret legislation. The Third Respondent seeks to challenge the case from a point of view that the Water Tribunal lacks jurisdiction and not locus standi, because the Third Respondent knows that the Water Tribunal has an obligation to interpret legislation.

76

The Appellant does concede that it seeks to prosecute an appeal in the Water Tribunal in the interests of the environment and in the interests of Mr. Willemse. It is true that appeals to the Water Tribunal must be lodged 30 days after the publication of the decision of the First Respondent in the Government Gazette. The Appellant found out about the section 33 declaration in 2010. By omitting the

public participation process, the First Respondent violated the

Appellant's rights and the rights of other interested parties.

The Appellant must be allowed to prosecute his appeal in the Water

Tribunal in the interests of justice. The Appellant is not a fortuitous objector, however he is acting in line with section 34 of

the Constitution, in that the Appellant seeks to protect the environmental integrity of the area. Even though the Water Tribunal

is a creature of statute, the Water Tribunal is obliged to interpret legislation. The Appellant is not asking the Water Tribunal to rule

on the constitutionality or otherwise of section 41 of the NWA.

77

The Appellant referred to a joint report by the First Respondent and the Department of Forestry at page 647 of the bundle.

78

Section 33 of the NWA deals with a Water Use License, which was used and later discontinued.

79

With regard to the distinction between a written objection and an oral objection and the High Court has pronounced that a written objection is required.

80

The Werda case confirmed the liberal approach to interpretation of statutes, at Paragraph 29. By not following the public participation process, the First Respondent violated section 24 of the Constitution and the environmental integrity of the area.

Legislation, including

the NWA does not apply retrospectively. By requesting the Water Tribunal to do, a 'reading down' of section 41 of the

NWA the Appellant is guided by the decisions in the Ndimeni case. The Appellant is requesting the Water Tribunal to do a reading down and not a 'reading in'. A reading down of section

41 will not necessarily distort the section. The

Appellant strongly contended that where the First Respondent did not follow section

41, by allowing a public participation process, the precondition of the 'objector' as the only one having the right

to lodge an appeal must not be followed.

81

The issue of locus standi in this matter must be approached from a point of view of someone whose rights are affected by the decision of the First Respondent, in this case, the Appellant. The

Appellant is affected by the environmental degradation in the area.

ANALYSIS

OF SUBMISSIONS

Jurisdiction

82

As pointed

out initially, the First and Second Respondents do not object to the Water Tribunal's jurisdiction to deal with

this matter, while

the Third Respondent contends that the Water Tribunal does not have jurisdiction to deal with this matter, due to lack of jurisdiction.

The Third Respondent's argument is dismissed outright and the Water Tribunal asserts that it has

jurisdiction to adjudicate over

this matter due to the fact the cause of action, in this matter is based on section 148(1)(f) of

the NWA. The Appellant's pleaded

case, places this matter squarely within the exclusive jurisdiction of the Water Tribunal.

The issue of jurisdiction where there is the possibility of multiple forums was long settled in the matter of *Chirwa v*

Transnet Limited and Others[7].

The basic principle in *Chirwa*, that was pronounced by the Constitutional Court is that the High Court does not have concurrent jurisdiction with the Labour Court where the employee had expressly relied on provisions of the Labour Relations Act of 1996 (the LRA) in

formulating a legal claim or cause of action. The Constitutional Court went further to state that, an applicant cannot be in a

preferential position, having access to multiple forums, simply because of her or his status as a public sector employee.

The fact

that the Appellant formulated his claim on the basis of section 148(1) (f) and it is also clear from the Appellant's

pleaded

case that this is a matter that belongs within the exclusive jurisdiction of the Water Tribunal.

83

In the case

of *Michael*

Poemedie & Pniel CPA v Department of Water and Sanitation and Another[8]

the Water

Tribunal, in respect of the preliminary point raised by the First Respondent, that it (the Water Tribunal) lacks jurisdiction

to

adjudicate over a case, the Chairperson of the hearing, Maake N, at

paragraph 50, stated that: “The Tribunal is expected to empire upon water-related appeal matters as a specialized court of first instance, hence its status is compared to that of the Magistrate’s Court. Section 149(4) states that “The appeal must be prosecuted as if it were an appeal from a Magistrate’s Court to a High Court”. In terms of this Act a Water Tribunal was created which ought to have enhanced water security and to have provided a settled forum to adjudicate disputes and to assist in developing the jurisprudence of water law. The Tribunal is also expected to deal with water related appeal matters as expeditiously as possible, with the intention to enhance Legal and Policy certainty in the country. The Tribunal...cannot refer matters based on points in limine to the High Court without listening to the submissions of the parties’ arguments and not making a sound judgment based on the law. This will defeat the purpose of the Legislature in forming the Water Tribunal. It will have the unintended consequences of turning the High Court into the court of first instance in relation to water related appeal matters. Should I refer this matter which deals with preliminaries to the high court, I would have abdicated my duties...The argument advanced by the First Respondent... is dismissed based on this point.”

84

The Water Tribunal accordingly asserts its jurisdiction to deal with all appeals, whose cause of action emanate from the NWA. The Constitutional Court, in the Chirwa case, has settled the debate and uncertainty over jurisdictional matters regarding specialised tribunals and the High Court. The Water Tribunal in the Michael Poemedie and Others has also confirmed the principle in the Chirwa case. The Third Respondent’s contention that the Water Tribunal lacks jurisdiction to adjudicate over his matter is therefore, dismissed.

Locus

Standi

85

Since the issue of the jurisdiction or lack thereof of, of the Water Tribunal to adjudicate over this matter, has been resolved, the issue of whether the Appellant has jurisdiction or not to lodge and prosecute his appeal in the Water Tribunal has to be determined.

86

The Appellant bases its right to lodge and prosecute its appeal in the Water Tribunal on three key issues namely: firstly, that the First Respondent failed to comply with section 41 of the NWA, in that the First Respondent failed to invite objections from the public, before granting the section 33 declaration, in favour of the Third Respondent. Secondly, the Appellant claims to be acting in the public interest, especially on behalf of Mr. Willemse, as the appeal is based on section 24 of the Constitution[9], in that the Appellant seeks to appeal to the Water Tribunal in order to put a stop to the environmental degradation that is taking place in the area. The third and last ground that the Appellant claims to have locus standi is that the granting of the section 33 declaration in favour of the Third Respondent has had the effect of a transfer of water use rights. Failure by the First Respondent to comply with section 41 of the NWA 87

All the legal authorities seem to be against the Appellant on this point. It is common cause that the Appellant and the Appellant's predecessor in title did not lodge an objection. The previous owners of the property the Hofmeyers did not lodge an objection as envisaged in section 148(1) (f) of the NWA.

88

The

Appellant placed heavy reliance on the Escarpment

Environment Protection
Group and Another v
Director General:

Department of Water and Sanitation and Another[10] and submitted that the essence of the said case is that, it is not correct that a person who has not lodged an objection does not have locus standi in terms of section 148(1)(f) "regardless of the reasons why they did not object". In its submissions the Appellant pointed out that the High Court referred to the example where notice is given through the media, which might not be very helpful to rural people who are mostly 'poorly educated or illiterate. This will lead to a situation where a few people who are literate and have easy access to the media are privileged over the majority who are left out of the process despite the fact that they are 'interested

persons'. The High Court, according to the Appellant was of the view that a legal construction which does not accommodate the illiterate person, who does not object because of such, 'valueless' to that illiterate person and would not promote the spirit and purport of the bill of rights[11]. The Appellant argues that there is no fairness when interested persons are left out of the process by not being notified, in that they are not given the opportunity to object, even if they wanted to. The High Court in the Escarpment case arrived at the same conclusion as the Water Tribunal that, where the appeal is brought to the Water Tribunal in the absence of an objection as envisaged in section 148(1) (f), the Water Tribunal would not have jurisdiction.

89

The First and Second Respondent contended that sections 148(1) (f) and 33 of the NWA apply in equal force to section 33 declaration applications.

Section

148(1) (f) of the NWA reads as follows:

"...There

is an appeal to the Water Tribunal (f) against a decision of a responsible authority on application for license under section 41 or

any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection.

90

The First and Second Respondents, as well as the Third Respondent argued that 'any appeal against a decision taken pursuant to section 33 declaration application must be brought within the confines of section 148(1)(f) of the NWA and the Water Tribunal tends to agree with the Respondents on this point. The mere fact that the

Appellant's predecessor in title did not lodge an objection, weighs against the Appellant's case, as the Appellant cannot

create rights, which did not come with the property, when the Appellant purchased the property from the Hofmeryers. On this point

alone, the Appellant's submission fails. Based on this finding it is not even worth entertaining the Appellant's argument,

whether the failure by the First Respondent to invite objections in terms of section 41 of the NWA, prejudiced the Appellant or not, as

the Appellant was not even there when the section 33 application was lodged by the Third Respondent and granted by the First Respondent.

91

The essence of the Werda case in the present matter is that the Water Tribunal noted the decision in the Escarpment case and held that an objection, which is lodged 'timeously' before a decision is made by the First Respondent, would still qualify as an objection. The Werda case also clarified the question 'who is an objector?'. The Water Tribunal held that appeals to the Water Tribunal are not open to a 'limitless class of persons' and stated that an objector is 'a person who has participated in the WUL application process' whether on invitation or on own volition and further that a person who has not lodged an objection is not an objector as contemplated in section 148(1)(f) of the NWA despite the reasons why they failed to lodge an objection. In the present case, the Appellant and the Appellant's predecessor in title did not object to the section 33 application of the Third Respondent and almost a decade later the Appellant seeks to challenge the decision made by the First Respondent.

92

The Water Tribunal in the case of Michael Poemedie and Pniel CPA v Department of Water and Sanitation and Another[12] on paragraph 53 held that "The Appellant does not have locus standi to prosecute this appeal matter on behalf of any of the members of the Pniel CPA. The Appellant did not submit an objection... before the Water Use License was issued, and therefore Appellant is not an objector."

93

The Appellant therefore does not have locus standi to prosecute this appeal in the Water Tribunal on the basis that the Appellant did not lodge an objection.

Acting

in the public interest on the basis of section 24 of the Constitution

94

The Water Tribunal concurs with the Respondents that the Water Tribunal is a creature of statute and that its jurisdiction is derived from the NWA and on that basis the Water Tribunal cannot source or derive its jurisdiction from the Bill of Rights, in the form of a cause of action, although The Water Tribunal is bound to take into account and interpret all law within the prism of the Constitution and the Bill of Rights, as that can only take place when the merits of the case are being considered and not as a basis of a

cause of action to determine locus standi, on the part of the Appellant.

Unintended

transfer of rights due to the section 33 declaration

95

With regard to the submission that the granting of the section 33 declaration by the First Respondent in favour of the Third Respondent, one would tend to agree with all the Respondents that this submission by the Appellant lacks any merits on the basis that it is not clear and not comprehensible. There is therefore no factual or

legal basis to arrive at the conclusion that the section 33 declaration granted by the First Respondent in favour of the Third Respondent amounted to or resulted in a transfer of water use rights.

RULING

AND ORDER

96 After taking into account all the facts of this case, the submissions

made by Counsels for the Appellant, the First and Second Respondents, as well as Counsel for the Third Respondent, the following ruling and order are hereby made:

88.1. It is apparent from the documents submitted by the Appellant that this is a matter that falls within the scope and ambit of the Water Tribunal. The Water Tribunal has jurisdiction over this matter, being a matter brought before the Water Tribunal in terms of section 148(1)(f) of the NWA.

88.2. The Appellant did not lodge an objection in terms of section 41 of the NWA and is therefore not an objector.

88.3. The Appellant does not have locus standi to prosecute this appeal in the Water Tribunal.

88.4. The Appellant has a right to approach the High Court for the review and setting aside of this ruling, or to seek any other relief.

Thus handed down in Pretoria on the 2nd August 2021

M.R. Mokgalabone

Chairperson of the Hearing The following member concurs:

Ms U.N. Mbeki

Additional Member

For the Appellant: Adv.

Joubert

Instructed by: Chennels

Albetyn Attorneys

For the First and Second Respondents: Adv. Mpshe

Instructed by: the

State Attorney

For the Third Respondent: Adv.

La Grange SC

Instructed by: Du

Bois Attorneys

[1] Escarpment Environmental Protection Group and Another v Director General: Department of Water and Sanitation and Another (WT03/17/MP) (2017) ZAWT 1 (27 November 2017)

[2] Ndimeni v Meeg Bank Ltd (Bank of Transkei) (2011 (1) SA 560 (SCA);

[2011] 3 All SA 44 (SCA)) [2010] ZASCA 165; 692/09 (1 December 2010) [3] Werda Handel (Pty) Ltd and Another v Director General: Department of Water and Sanitation and Another (WT25/03/2015) [2017] ZAWT 4 (9 February 2017)

[2] Ndimeni v Meeg Bank Ltd (Bank of Transkei) (2011 (1) SA 560 (SCA);

[2011] 3 All SA 44 (SCA)) [2010] ZASCA 165; 692/09 (1 December 2010)

[3] Werda Handel (Pty) Ltd and Another v Director General: Department of Water and Sanitation and Another (WT25/03/2015) [2017] ZAWT 4 (9 February 2017)

[4] Promotion of Administrative Justice Act 3 of 2000 (hereafter PAJA)

[5] The Constitution of the Republic of South Africa, 1996

[6] National Environmental Management Act 107 of 1998

[7] Chirwa v Transnet Limited and Others (CCT 78/06) [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008(3) BCLR 251 (CC) ; [2008] 2 BLLR 97 (CC) ; (2008) 29 ILJ 73 (CC) (28 November 2007)

[8] Michael Poemedie & Pniel CPA v Department of Water and Sanitation and Another (WT01/17/MP) 2021

[9] Constitution of the Republic of South Africa, 1996

[10] Escarpment Environment Protection Group and Another v Director: General of Water and Sanitation and Another (WT03/17/MP) 2017 ZAWT 1 (27 November 2017)

[11] Constitution of the Republic of South Africa, 1996, Chapter 2, sections 7 to 37

[12] Michael Poemedie and Pniel CPA v Department of Water and Sanitation (WT01/17/MP) (9 July 2021)

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