

SOUTH AFRICA / JUDGMENT

De Mona Eindomme CC v Department of Water Affairs (WT 24/11/2010)

[2011] ZAWT 3 (19 May 2011)

[2011] ZAWT 3

COURT

Water Tribunal

BEFORE

W Singo, H Thompson, A S Makhanya

CASE / FILE NUMBER

WT 24/11/2010

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IN THE WATER TRIBUNAL

HELD AT ROODEPLAAT DAM NEAR PRETORIA

REF: WT 24/11/2010

In the application for condonation between:

DE MONA EIENDOMME CCAPPLICANT

and

THE DEPARTMENT OF WATER AFFAIRSRESPONDENT

CONDONATION RULING: 18 FEBRUARY 2011

APPEARANCES:

Coram : Dr W Singo (Vice Chairperson of the Water Tribunal and

Presiding Officer of the hearing)

Mr H Thompson (Member of the Water Tribunal)

Mr A S Makhanya (Member of the Water Tribunal)

For the Applicant : Mnr H du Toit

For the Respondent : Mr T M Sedibe

1- DETAILS OF HEARING AND REPRESENTATION

1.1. This is a unanimous ruling in the application for condonation heard on 18 February 2011 at Roodeplaat Dam near Pretoria.

1.2. The Applicant was represented by Mnr H du Toit from Centurion.

1.3. The Respondent was represented by Mr T M Sedibe from the Directorate Legal Services in the Head Office of the Respondent in Pretoria.

1.4. The proceeding was recorded mechanically on 1 audio tape.

2. ISSUE TO BE DECIDED

2.1. The question to be answered by the Water Tribunal was whether there is a good reason to condone the late lodging of an appeal by the Applicant against a decision of the Respondent dated 23 September 2008.

3.

BACKGROUND

TO THE ISSUE

3.1. The Respondent issued a notice to Kleindeel (Pty) Ltd, as the registered owner of Portion 1 of the farm Zand Draai 682 Harrismith RD at that time, in terms of section 35(1) of the National Water Act, Act 36 of 1998 (NWA), in order to verify the lawfulness and extent of the existing water use on the property concerned.

3.2. The Respondent then verified the lawfulness and extent of the water use of this property in terms of section 35(4), which also limits the extent of the existing lawful water use applicable to this property. The notice containing the verification was sent to Kleindeel (Pty) Ltd dated 23 September 2008.

3.3. The extent of the existing lawful water use applicable to this property in respect of the taking of water from a water resource, the Wilge and Cornelius Rivers, is 219 600 cubic meters per year, 36 hectare of irrigation at a quota of 6 100 cubic meters of water per hectare per annum.

3.4. The Applicant appealed against a decision on this verification in terms of section 148(1)(e) to the Water Tribunal and the appeal notice was lodged with the Registrar of the Water Tribunal on 23 November 2009.

3.5. According to section 148(3)(b) an appeal must commence within 30 days after notice of the decision was sent to the appellant concerned.

3.6. The Applicant applied in terms of rule 4(4) of the Rules to the Water Tribunal for the condonation of the late lodging of the appeal.

4. SURVEY OF EVIDENCE AND ARGUMENTS Evidence and documents submitted

4.1. No oral evidence was adduced. Both the Applicant and Respondent made oral submissions through their respective representatives.

4.2. The Applicant submitted a document called "Grounds for Condonation" to the Tribunal at the start of the hearing and used it in support of the application.

4.3. The Bundle from the Registrar of the Water Tribunal also forms part of the evidence and arguments analysed by the Tribunal.

Contents of the documents submitted by the Appellant and also argued

4.4. Portion 1 of the farm Zand Draai 682 Harrismith RD is situated in the catchment of the Vaal Dam, to which the provisions of Proclamation 1187 dated 24 July 1970 apply.

4.5. The owner of the property at that time, Kleindeel (Pty) Ltd, who is the Applicant's predecessor-in-title, timeously registered or supplied the information to the Respondent as required by item 4 of the said Proclamation, namely 42 morgen (36 hectare).

4.6. There was a duty on the Respondent to perform certain actions in terms of the repealed Water Act 1956 so that water rights could be published. But because this was not done, there is a lack of available information.

4.7. The Applicant purchased the property on 9 May 2008 and became the registered owner thereof on 28 July 2008. He derived all rights conferred upon his predecessor-in-title.

4.8. The Applicant and Kleindeel (Pty) Ltd jointly informed the Respondent of the change in ownership with full particulars on 1 August 2008, which was changed on the WARMS system on 1 August 2008.

4.9. After the Respondent had verified the lawfulness and extent of the water use of the property in terms of section 35(4) and informed Kleindeel (Pty) Ltd thereof, the Applicant applied for the verification of the water use in respect of the property. The date of this application and the contents thereof were not disclosed to the Tribunal.

4.10. According to the Applicant the Respondent failed to apply the law or to apply it correctly and to take notice of the Proclamation and the submissions when they verified the lawfulness and extent of the existing water use. Further the Respondent also made the final decision to a person that was not the owner of the property and erred in only recognizing 6 100 cubic meters of water per hectare per annum.

4.11. The Applicant was not afforded the opportunity to make representation on the verification of the water use.

4.12. According to the Applicant a new owner of a property has to register the use of water in terms of regulation requiring the registration of a water use published by Notice 1352 dated 12 November 1999 by informing the Respondent of any change in the existing registration, which the Applicant did.

4.13. The Applicant argued that any action against a previous owner regarding the verification of a water use would only have been kept active until the registration of that water use by a new owner. Thereafter a new verification process with the new owner should start.

4.14. Therefore when the Applicant registered the water use, the verification process regarding the property should have stopped and started again involving the Applicant.

4.15. According to the Applicant the Respondent appointed consultants to assist with the verification process and the consultants used a record system which did not synchronize with other records or systems.

4.16. The Applicant argued therefore that the decision taken by the Respondent regarding the verification is invalid.

4.17. The Applicant cannot inform the Water Tribunal when they became aware of the decision on the verification of the water use concerned.

4.18. The appeal is for 466 200 cubic meters of water per annum to be recognized as the existing lawful water use for Portion 1 of the farm Zand Draai 682 Harrismith RD. The appeal would allow the Applicant, as the new owner of the property, the opportunity to make representation to the Water Tribunal of the true facts.

4.19. On request from the Tribunal to provide reasons or a reasonable explanation why the appeal is late, no real reasons or explanation were given by the Applicant, except to mention that during the verification process the ownership of the property changed and that is a good reason why condonation should be granted. The verification was directed to the wrong person, namely Kleindeel (Pty) Ltd, the previous owner, and not to the Applicant. The Applicant did what was required from them, while the Respondent did not do anything. The verification process should have stopped when the Applicant bought the property and then started again from the beginning. The verification was done based on not all the relevant information.

Arguments by the Respondents

4.20. There is no reasonable explanation from the Applicant why there is a late appeal from them against the verification of the water use.

4.21. The verification decision was made in respect of the previous owner, Kleindeel (Pty) Ltd, as the process to verify the water use started against him and the provisions of section 35 requires that.

4.22. The Applicant was already aware of the verification decision when he wrote a letter to the Respondent on the matter dated 29 October 2008, see page 20 of the Bundle of the Registrar.

4.23. The verification of the lawfulness and extent of a water use is about a property and not a person.

5.

ANALYSIS

OF EVIDENCE AND ARGUMENTS

5.1. An appeal must in terms of section 148(3)(b) of the NWA commence within 30 days after notice of the decision was sent to the appellant concerned. Neither the Applicant nor the Respondent argued when the decision was sent to the Applicant, if at all, and from when the 30 days period should have started to run.

5.2. The decision dated 23 September 2008 was sent to Kleindeel (Pty) Ltd, who is the Applicant's predecessor-in-title, and not to the Applicant. It is unclear whether and how the Applicant got hold of the decision, and whether that is or could be regarded as sent to the Appellant for the purposes of section 148(3)(b). Together with this, whether the Applicant is a person affected by the verification as contemplated by section 148(l)(e).

5.3. The letter dated 29 October 2008 (page 20 of the Bundle of the Registrar) was not submitted to the Tribunal, but the Tribunal, after considering all the relevant documents, is satisfied that at the date of the letter the Applicant was already aware of the verification decision.

5.4. For the purpose of the ruling, it is therefore assumed that the decision was sent to the Applicant after 23 September 2008 but before 29 October 2008. Therefore, the lodging of the appeal is just more than a year late.

5.5. According to the Tribunal the following criteria should be addressed, as required by the common law, in determining whether there is a good reason to grant condonation for the late lodging of an appeal: the degree of lateness; the reasonableness of the explanation for the delay; the prospects of success in the matter; and whether there is prejudice to the other parties to the matter.

5.6. As far as the criterion "the degree of lateness" is concerned, the appeal commenced about a year late. It is according to the Water Tribunal significant, and because of that, a reasonable explanation for the delay should be given.

5.7. The Tribunal is not satisfied that the Applicant gave any reasonable explanation for the delay. When requested for comments on the matter, the Applicant every time referred to the fact that the ownership of the property changed during the verification process and that that is a good reason why condonation should be granted.

5.8. As far as the criterion "the prospects of success in the dispute" is concerned, the Applicant argued that during the verification process the ownership of the property changed and as a result thereof the verification decision was directed to the wrong person, namely Kleindeel (Pty) Ltd, the previous owner, and not to the Applicant.

5.9. It is the Tribunal's understanding of the provisions of section 35 of the NWA that if a notice has been sent to a person in terms of section 35(1), there is no obligation on the responsible authority to start with the process again if there is a change in ownership of the property concerned, although it may. The notice under section 35(1) is addressed to "a person claiming an entitlement to ...[a] water use", and not to the owner of the property. The person claiming the entitlement and owner need not to be the same.

5.10. The Responsible authority may in terms of section 35(3)(c) invite written comments from any person who has an interest in the matter. This might for example be the owner, if the owner is not the water user, or if there is a change in ownership of the property, the new owner.

5.11. Based on information obtained under section 35(2) and (3), the responsible authority may then in terms of section 35(4) determine the extent and lawfulness of the water use in question, and such lawfulness limits the extent of any existing lawful water use applicable to that use.

5.12. The Tribunal is of the opinion that the applicant's argument about the registration of the water use is not relevant to determine whether there is a good reason to condone the late lodging of an appeal by the Applicant.

5.13. The Tribunal has no authority to decide on whether the responsible authority should have invited comments from the Applicant, or whether the process prescribed by the NWA and followed by the Responsible authority is a due process and justifiable as required by the law or whether the responsible authority should have started with the process again due to the change in ownership of the property. There are other institutions to deal with that.

5.14. Based only on this argument from the Applicant, the Tribunal is not convinced that there is any prospect of success as far as the appeal to the Tribunal is concerned.

5.15. However, the Applicant did say that the verification was based not on all the relevant information. It is not clear to the Tribunal what the relevant information consists of and what it relates to, for example the 36 hectare or the quota of 6 100 cubic meters of water per hectare per annum, or both, or something else. Irrespective of the lack of understanding on what type of information is available, the Tribunal is of the opinion that the Applicant should be allowed to put the information to the Tribunal for the Tribunal to deal with, provided that the other criteria for condonation has been satisfied and the Applicant is a person affected by the verification as contemplated by section 148(l)(e).

5.16. As far as the criterion "whether there is prejudice to the other parties to the matter" is concerned, neither the Applicant nor the Respondent gave any information or arguments on this. Therefore the Tribunal is of the opinion that there would be no prejudice to any one if the Tribunal condones the late application.

5.17. After the Tribunal has considered all the relevant information, the Tribunal is not satisfied that there exists any good reason to grant condonation for the late lodging of the appeal by the Applicant against the decision on the verification of the water use on Portion 1 of the farm Zand Draai 682 Harrismith RD by the Respondent. The Applicant did not give any real or reasonable explanation why the appeal was lodged late, probably one year.

6. DECISION

6.1. In the result, the Water Tribunal does not grant condonation for the late lodging of an appeal by the Applicant against the decision on the verification of the water use on Portion 1 of the farm Zand Draai 682 Harrismith RD by the Respondent dated 23 September 2008

6.2. The file before the Water Tribunal should therefore be closed.

Dated at Pretoria on this 19th day of May 2011

H. THOMPSON

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Prepared on 12 October 2026 · Esheria