

SOUTH AFRICA / JUDGMENT

Escarpment Environment Protection Group and Another v Department of Water Affairs and Others (A666/11, 4333/12, 4334/12) [2013] ZAGPPHC 505 (20 November 2013)

[2013] ZAGPPHC 505

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten, M Victor

CASE / FILE NUMBER

A666/11, 4333/12, 4334/12

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC

OF SOUTH AFRICA

CASE

NO: A665/11 ; 4535/11

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

DATE:

20 NOVEMBER 2013

In

the matters between:

ESCARPMENT
ENVIRONMENT PROTECTION GROUP.....First
Appellant
WONDERFONTEIN
COMMUNITY ASSOCIATION.....Second
Appellant
and
DEPARTMENT
OF WATER AFFAIRS.....First
Respondent
XTRATA
ALLOYS (PTY) LTD.....Second
Respondent
THE

WATER TRIBUNAL.....Third
 Respondent
 CASE
 NOS: A666/11; 4333/12
 ESCARPMENT
 ENVIRONMENT PROTECTION GROUP.....First
 Appellant LANGKLOOF ENVIRONMENTAL COMMITTEE.....Second
 Appellant
 DEPARTMENT
 OF WATER AFFAIRS.....First
 Respondent
 WER
 MINING (PTY) LTD.....Second
 Respondent
 THE
 WATER TRIBUNAL.....Third
 Respondent
 CASE
 NOS: A667/11; 4334/12
 ESCARPMENT
 ENVIRONMENT PROTECTION GROUP.....First
 Appellant WONDERFONTEIN COMMUNITY ASSOCIATION.....Second
 Appellant
 DEPARTMENT
 OF WATER AFFAIRS.....First
 Respondent
 EXXARO
 COAL (PTY) LTD.....Second
 Respondent
 THE
 WATER TRIBUNAL.....Third
 Responden

JUDGMENT

Tuchten J:

1 The proceedings before us arise from appeals which served before the third respondent, the Water Tribunal. The Water Tribunal was established by s 146(1) of the National Water Act, 36 of 1998 (“the NWA”). One of the functions of the Water Tribunal is to hear appeals arising from the decisions of responsible authorities on applications for licenses for water use under s 41 of the NWA.

2 There are before us, by direction of the Deputy Judge President, three appeals and three reviews from decisions of the Water Tribunal given on appeal to it against decisions made by responsible authorities. In addition, we must adjudicate upon a number of interlocutory

applications in which the appellants seek in effect condonation for various failures to comply with the rules relating to the prosecution

of appeals. These include the failure timeously to lodge the record, the failure to lodge a power of attorney authorising the appellants'

attorneys to act in the appeal. In these instances the appellants brought substantive applications for condonation. At one stage the WER Mining appeal (case no. A666/11) lapsed. The appellants have brought a substantive application for the reinstatement of the WER Mining appeal.

3 All the interlocutory applications were opposed. In addition, the appellants were remiss in omitting timeously to file the power of attorney required under rule 7(2).[1] This omission was cured. It was not suggested that the eminent senior counsel or his junior or their attorney who represented the appellants at any stage acted without authorisation. The omission to file the power of attorney caused no prejudice to the court or any party. It was conceded that the court had the power without more to condone this omission. We do so condone.

4 There is in addition an application to consolidate the three appeals and the three reviews. The consolidation application was opposed but not argued and was overtaken by the direction that the appeals and reviews all be heard together.

5 The proceedings brought by the appellants were all initially opposed by all the cited second respondents and by the first respondent, which was cited as the Department of Water Affairs ("the DWA"). We were told by counsel that the Water Tribunal is not presently functional; its members all apparently having resigned. The Water Tribunal, although cited as a respondent, did not oppose any of the proceedings. By notices dated 28 October 2013, the DWA withdrew its opposition. The appeal involving Exxaro Coal (case no A667/11) was settled with the appellants pursuant to a written settlement agreement concluded in April 2013. In the proceedings before us, the appellants, on the one hand, and WER Mining and Xtrata Alloys (whom I shall call collectively the respondents) on the other were represented. The cases in which these respondents were involved proceeded before us.

6 The appeals and reviews all raise one crisp point of law. Their merits, despite the immense volume of the paper before us, depend upon the answer to this single question:

Where a responsible authority has not invoked its power under s 41(4)(a)(ii) of the NWA to require a license applicant to give notice

of its application for a water use license and to state in such notice that written objections may be lodged against the application

before a specified date, does a person who has nevertheless lodged a written objection in time to enable him to participate in the decision making process have, if the license is granted against his objection, a right of appeal to the Water tribunal under s 148(1)(f) of the NWA?

7 The answer to this question does not, regrettably, end the enquiry before us. This is because the appellants have not complied with various rules relating to the prosecution of appeals from magistrates' courts to this court and at least one of their appeals lapsed pursuant to certain non-compliances. In this regard the appellants seek what I shall generally call condonation. Counsel for the respondents, however, conceded, as they were bound to do, that in relation to these procedural matters the court has a wide discretion to condone. And it was accepted between counsel that in the exercise of this discretion, the degree of non-compliance with the Rules, the importance of the case, explanations for the failures to comply with Rules, efforts made toward compliance, prospects of success, the interest of the respondents on appeal in finality, avoidance of unnecessary delay, convenience of the court and prejudice all play a part. Where there are no prospects of success at all it will be difficult to envisage a case in which condonation will be granted. But nevertheless the law is clear: the court considers all the factors I have mentioned and exercises a judicial discretion in which it strives to be fair to all the litigants before it. In one case the cogency of the explanation

advanced may be decisive; in another the prospects of success or the absence of prejudice will carry the day. Each case depends on its own facts. That is why reported instances in which another court exercised its condonation discretion in a specific way do not constitute authority binding on the court called upon to exercise its discretion in the case before it for consideration.

8 To put the crisp point before us in its context, I need to give some background. The respondents are both engaged in mining activities. In pursuance of those activities they applied to the DWA for water use licenses under the NWA. Of crucial importance in these appeals, the DWA did not direct the respondents (as applicants for water use licenses) to publish notices informing readers that written objections to the grant of the licenses might be lodged within a specified time. The respondents accordingly did not publish any such notices. The appellants nevertheless found out about the applications for water use licenses and submitted written objections.

9 It is unnecessary for present purposes to go into the minutiae of the objections. They were directed both at the process followed by the DWA in its consideration of the applications and the substance of the applications themselves, in particular the environmental degradation the appellants asserted would take place if the licenses were granted.

10 The appellants themselves are non-governmental organisations. The first appellant's members reside in, work in or regularly visit the catchment areas affected by the license applications. Some of the first applicant's members are farmers and eco-tourism operators. The second appellant's members, some 400, are land claimants and occupiers and farm workers, also in the relevant catchment areas. The appellants have a legal interest in and are affected by the license applications.

11 Despite the objections, the licenses were granted; WER Mining's license was granted on 24 October 2008 and Xtrata's license was granted on 9 December 2009. The appellants then sought, out of time, to appeal against the decisions granting the licenses to the Water Tribunal. As they were out of time, they sought condonation for their late appeals to the Water Tribunal. Condonation was granted by the Water Tribunal.

12 The Water Tribunal then required the appellants to address it on the question whether the appellants had the requisite standing to appeal to the Water Tribunal. This issue was argued separately from the merits of the appeals. The Water Tribunal found that the appellants did not have the requisite standing and dismissed the appeals, without pronouncing on their merits. In the case of Exxaro, too, there was no direction in relation to the publishing of notices calling for written objections within a specified time but the appellants nonetheless submitted a written objection. Exxaro was granted a license. The appellants sought to appeal against the grant of the license to Exxaro.

But In the Exxaro case, too, the Water Tribunal similarly found that the appellants lacked standing to appeal.

13 The NWA provides for an appeal to this court on questions of law against decisions of the Water Tribunal given on appeal to it. Thus the appeals before us. After commencing the appeal procedures, the appellants decided to bring reviews of the Water tribunal's decisions to this court. Thus the reviews. The reviews were not stated in their notices of motion to be in the alternative to the

appeals, but that is how counsel argued them. A consideration of the reviews will only be necessary if the appeals fail.

14 It is necessary to describe in some detail the legislative scheme applicable to the present disputes. The starting point must be the Constitution. Under s 24:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (I) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

15 The protection of the environment is an important constitutional concern. The Constitutional Court said:[2]

The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights

contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out.

16 The primary legislative measure contemplated in s 24(b) is the National Environmental Management Act, 107 of 1998 ("NEMA"). Its long title and preamble read:

ACT

To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment,

institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.

Preamble

WHEREAS many inhabitants of South Africa live in an environment that is harmful to their health and well-being; everyone has the right to an environment that is not harmful to his or her health or well-being;

the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities;

inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices; sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations; everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and

secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

the environment is a functional area of concurrent national and provincial legislative competence, and all spheres of government and all organs of state must co-operate with, consult and support one another;

AND WHEREAS it is desirable -

that the law develops a framework for integrating good environmental management into all development activities; that the law should promote certainty with regard to decision-making by organs of state on matters affecting the environment;

that the law should establish principles guiding the exercise of functions affecting the environment; that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment;

that the law should establish procedures and institutions to facilitate and promote co-operative government and intergovernmental relations;

that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance;

that the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society; ...

17 Section 2 of NEMA sets out the principles which are to apply throughout the Republic alongside “all other appropriate and

relevant considerations”, “serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment” and “guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment”. These principles prescribe, to the extent relevant for present consideration, that[3]

(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

(3) Development must be socially, environmentally and economically sustainable.

(4)

(a) Sustainable development requires the consideration of all relevant factors including the following:

(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

(iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

(iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

(v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;

(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;

(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

(b) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

(c) Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

(d) Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

(e) Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.

(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

(h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.

(i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

(j) The right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers must be respected and protected.

(k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

18 The purpose of the NWA, one of the measures contemplated in NEMA and thus to be interpreted having regard to the provisions of NEMA which I have quoted, is expressed in s 2. It is:

... to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors-

(a) meeting the basic human needs of present and future generations;

...

(e) facilitating social and economic development;

(f) providing for growing demand for water use;

(g) protecting aquatic and associated ecosystems and their biological diversity;

(h) reducing and preventing pollution and degradation of water resources;

and for achieving this purpose, to establish suitable institutions

19 The NWA provides for licensed and unlicensed water use. The uses for which the respondents as license applicants sought licenses are lawful only under a license granted pursuant to an application to a "responsible authority" under s 41 of the NWA.[4]

20 Applications for water use will often affect the rights of others. A responsible authority which decides an application under s 41 of the NWA performs an administrative action. Those affected by such an application for water use are thus entitled, under s 33(1) of the Constitution, to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") prescribes in such a case that the organ of state taking the administrative action must consider in each case what procedure would most appropriately give effect to the right to procedurally fair administrative action.

21 The scheme in the NWA for achieving the constitutionally mandated end of procedurally fair administrative action is contained in s 41. I think it is necessary to quote it in full:

Procedure for licence applications

(1) An application for a licence for water use must-

- (a) be made in the form;
 - (b) contain the information; and
 - (c) be accompanied by the processing fee, determined by the responsible authority.
- (2) A responsible authority-
- (a) may, to the extent that it is reasonable to do so, require the applicant, at the applicant's expense, to obtain and provide it by a given date with-
 - (i) other information, in addition to the information contained in the application;
 - (ii) an assessment by a competent person of the likely effect of the proposed licence on the resource quality; and
 - (iii) an independent review of the assessment furnished in terms of subparagraph (ii), by a person acceptable to the responsible authority;
 - (b) may conduct its own investigation on the likely effect of the proposed licence on the protection, use, development, conservation, management and control of the water resource;
 - (c) may invite written comments from any organ of state which or person who has an interest in the matter; and
 - (d) must afford the applicant an opportunity to make representations on any aspect of the licence application.
- (3) A responsible authority may direct that any assessment under subsection (2) (a) (ii) must comply with the requirements contained in regulations made under section 26 of the Environment Conservation Act, 1989 (Act 73 of 1989).
- (4) A responsible authority may, at any stage of the application process, require the applicant-
- (a) to give suitable notice in newspapers and other media-
 - (i) describing the licence applied for;
 - (ii) stating that written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice;
 - (iii) giving an address where written objections must be lodged; and
 - (iv) containing such other particulars as the responsible authority may require;
 - (b) to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public; and
 - (c) to satisfy the responsible authority that the interests of any other person having an interest in the land will not be adversely affected.

22 Two procedures for facilitating the involvement of interested persons are specifically identified in s

41. Section 41(2)(c) empowers a responsible authority to “invite written comments from any organ of state which or person who has an interest in the matter”, while s 41 (4) empowers a responsible authority to require a license applicant to give “suitable notice” in the media in which the responsible authority may require the applicant to state that

... written objections may be lodged against the application before a specified date, which must be not less than 60 days after the last publication of the notice.

23 A considerable degree of flexibility is accorded to the responsible authority to achieve procedurally fair administrative action. It will be noted that none of the provisions of s 41 are mandatory in the sense that a responsible authority is bound by the provisions of s 41 itself to take any of the steps specified in the section. In each of the instances provided for in s 41, the responsible authority “may” take the step described. In my view, the word “may” should be read as a complete discretion to the responsible authority to decide whether or not to require publication, coupled with a duty to do so in a proper case.[5] Whether or not a responsible authority is required by law to take any such step depends on the facts of the case before it. And the steps individually described in s 41 are not the only steps which a responsible authority can, or should, take in a given instance. A responsible authority must take steps within its power to ensure compliance with s 33 of the Constitution and s 3 of PAJA. To that end, s 4(1)(e) of PAJA specifically empowers a responsible authority[6] to follow a procedure other than those specifically mentioned in ss 4(1)(a) and (b) which is appropriate to give effect to s 3.

24 I must stress, for reasons which will emerge, that a responsible authority need not, even if it invokes its powers specifically conferred by s 41 (4) to require notice through the media, require that a license applicant must make mention of objections, written or otherwise, or a specified date for the lodging of such objections. The type of notice in each case, I repeat, must be determined on the facts of the individual case. This is recognised in s 41(4)(b) which empowers a responsible authority to require a license applicant to

... to take such other steps as it may direct to bring the application to the attention of relevant organs of state, interested persons and the general public.

25 The notice regime envisaged under s 41(4), with or without its potential prescription under s 41 (4)(a)(ii) for admonishing objectors to lodge written objections before a specified date is thus merely one of a range of options available to a responsible authority to achieve compliance with the constitutionally mandated requirement of administrative action which is procedurally fair to those affected by it, in this case the decision on an application for a water use license.

26 Under s 42 of the NWA, after a responsible authority has reached a decision on a license application, it must promptly notify the applicant and any party who has objected to the application.

27 This brings me to the Water Tribunal which, I have said, was established under s 146(1) of the NWA. It is an independent body with country wide jurisdiction. It is required to consist of a chairperson, a deputy chairperson and such members as the Minister of Water Affairs and Forestry considers necessary. Under s 147(1), a matter before the Water tribunal may be heard and decided by any one or more of its members.

28 Appeals lie to the Water Tribunal in a number of situations identified in s 148(1) of the NWA. Here again, I must quote the provisions in full:

- (1) There is an appeal to the Water Tribunal-
 - (a) against a directive issued by a catchment management agency under section 19(3) or 20(4) (d), by the recipient thereof;
 - (b) against a claim by a catchment management agency for the recovery of costs under section 19(5) or 20(7) by the person affected thereby;
 - (c) against the apportionment by a catchment management agency of a liability for costs under section 19(8) or 20(9), by a person affected thereby;
 - (d) against a decision of a water management institution on the temporary transfer of a water use authorisation under section 25(1), by a person affected thereby;
 - (e) against a decision of a responsible authority on the verification of a water use under section 35 by a person affected thereby;
 - (f) against a decision of a responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection against the application;
 - (g) against a preliminary allocation schedule published by a responsible authority under section 46 (1), by any interested person;
 - (h) against the amendment of a condition of a licence by a responsible authority on review under section 49(2), by any person affected thereby;
 - (I) against a decision of a responsible authority on an adjudication of claims made under section 51(1), by any person affected thereby;
 - (j) against a directive issued by a responsible authority under section 53(1), by the recipient thereof;
 - (k) against a claim by a water management institution for the recovery of costs under section 53 (2) (a), by the person against whom the claim is made;
 - (l) against a decision by a responsible authority on the suspension, withdrawal or reinstatement of an entitlement under section 54, or on the surrender of a licence under section 55, by the person entitled to use water or by the licensee; and

- (m) against a declaration made by, directive given by or costs claimed by the Minister in respect of a dam with a safety risk under section 118(3) or (4).

29 Because it is relevant to an argument made by counsel for WER Mining, I must add that the effect of the noting of an appeal to the Water Tribunal is to suspend a license for water use granted under s 41, unless the Minister directs otherwise.

30 Section 149 of the NWA gives to a party to a matter in which the Water Tribunal has given a decision on appeal under s 148 the right to appeal, on a question of law, against that decision to a High Court. The appeal to the High Court must be noted in writing within 21 days “of the date of the decision of the Tribunal”. The notice of appeal must be lodged with the relevant high court and the Water Tribunal and be served on every party to the matter. The appeal itself must be prosecuted as if it were an appeal from a magistrate’s court to a high court.

31 I return now to the facts of the cases before us. The appellants appealed against the grant of the water use licenses to the Water Tribunal. Their appeals were noted out of time. They applied for condonation. A hearing was convened to determine whether condonation should be granted. It was. But then the question was raised whether the appellants had standing to appeal to the Water Tribunal. In the case of WER Mining, the Water Tribunal raised the question itself. Xtrata itself raised the question in its case.

32 The Water Tribunal proceeded after a hearing to find that the appellants had no standing to approach it on appeal as an objector against the grant of a water use license under s 41. It was common cause that in order to establish standing the appellants had to bring their case within s 148(1)(f). No other provision provided a basis upon which the appellants might legitimately appeal to the Water Tribunal against the grant of the licenses. But, said the Water Tribunal, s 148(1)(f) did not provide for an appeal by any person (apart from an aggrieved license applicant) except a person who had timeously lodged a written objection against the application.

33 And person who had timeously lodged, the Water Tribunal reasoned, could only refer to a person who had lodged a written objection pursuant to a notice given after having been required to do so under s 41(4)(a)(ii). But the responsible authority, as I have noted, did not require the respondents as water license applicants to do anything pursuant to s 41(4). So, the Water Tribunal concluded, no right of appeal to the Water Tribunal lay against the grant of the licenses by the appellants. The appellants were, it will be remembered, persons who had entered upon the issue and had lodged written objections against the grant of the licenses otherwise than after or pursuant to notice under s 41(4)(a)(ii).

34 In the present case, I consider it appropriate first to consider the appellants’ prospects of success. This is constitutional

litigation. The constitutionally protected rights to just administrative action, access to courts or other dispute resolution forums, equality and an environment that is not harmful are all engaged directly or indirectly by the issue raised. Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights. If there is more than one plausible interpretation of a statute, the court must adopt that interpretation of the measure which better promotes these constitutional values. A generous

interpretation is to be preferred to one which is merely textual or legalistic. The measure to be interpreted must be examined within the context of any related provisions and the statute as a whole, including its underlying values. While the text is often the starting point of any statutory construction, due regard must be paid to context.[7]

35 Where the interpretative function requires the ascertainment of the appropriate meanings or shades of meaning of words which can bear different meanings or shades of meaning, this should not be divorced from the broad context of the use of the words in question. A court must consider the apparent purpose of the measure and the context in which it occurs.[8]

36 In my view the measure we are called upon to consider can textually bear the meanings contended for by both sides. So we must determine the meaning to be preferred.

37 Taking the text of s 148(1)(f) alone, purely as a starting point, it is striking that the measure does not identify the written objection which creates the right of appeal. Had the purpose of the measure been to restrict the class of written objectors to those who responded to or merely responded after the publication of a notice containing the admonition concerning the specified date, one would have expected the text to have referred to a written objection pursuant to a notice under s 41 (4)(a)(ii) or at

the very least a written objection pursuant to a notice under s 41(4). For obvious reasons, a person who found out about the license

application and sought to participate in the decision making process where no such notice was published had a right to do so. This case is an example of just that.

38 Timeously is not defined in the NWA. In its dictionary definitions, the word can mean, according to the Oxford English Dictionary, sufficiently early, in good time; promptly; in a well timed or opportune manner. It was submitted by counsel for the respondents that a word used in a statute is generally presumed to bear the same meaning throughout. This is so but it is by no means an inflexible rule.[9] From that starting point, counsel argue that written objection in s 148(1)(f) should bear the meaning it carries in s 41 (4)(a)(ii).

39 But the premise on which the argument of counsel for the respondents is founded is flawed: the word timeously is not used in s 41 (4)(a)(ii). The proper enquiry, as I see it, is not what written objection means in the context of s 148(1)(f) but what timeously lodged a written objection means in that context. And indeed to interpret s 41 (4)(a)(ii) to mean that an objection lodged after a date specified in the subsection was not timeous in the sense that such an objection should ipso facto be excluded from consideration would be constitutionally offensive. As was correctly

conceded in argument by counsel for the respondents, a written objection submitted after the specified date but in good time to be dealt with during the decision making process must be taken into account. It seems strange to conclude that one and the same written objection may be timeous for the purposes of the s 41 decision making process (the single purpose for which it was solicited) but untimely for the purposes of s 148(1)(f).

40 The submission for the respondents, however, was that such a class of objectors, in common with all persons submitting written objections

otherwise than pursuant to and in accordance with a notice containing a specified date given in the media, did not obtain the right of appeal to the Water Tribunal enjoyed by those objectors whose written objections followed the appropriate notice pursuant to s 41(4)(a)(ii). From this it followed, quite ineluctably, that on the interpretation advanced by the respondents, an objector who through no fault of her own (eg through inability to read or otherwise access the media required for the notice) failed to lodge her written objection by the specified date would enjoy a right of participation in the initial application for the license but would not enjoy a right of appeal to the Water Tribunal.

41 Counsel for the respondents submitted that the exclusions of the classes of objectors I have mentioned from the appeal process to the Water Tribunal which follow from the interpretation they advanced were merely examples of a clearly discernable legislative scheme. We were rightly admonished to bear in mind the separation of powers doctrine and not to intrude upon the preserve of the Legislature merely because we thought a better scheme could be devised than that selected by the Legislature. In oral argument counsel for the respondents were invited to explain why the Legislature might rationally have chosen to exclude these objectors from the appeal process on no ground other than that the responsible authority had chosen to select one method over another of bringing the fact of the license application to the notice of potential objectors. Three grounds were advanced.[10] Manifestly, the means chosen to bring the fact of the license application to the notice of potential objectors can have no bearing

on the merits of any potential objection or the merits of any potential appeal.

42 Furthermore, the purpose of the specified date would not be to limit participation in the decision making process before the responsible authority, the administrative process which was the subject of the published notice - because there was no basis upon which to ignore an objection received after the expiry of the specified date but in good time for consideration by the responsible authority. This even though the only administrative process identified in the notice would be that before the responsible authority. The purpose proposed would be to limit participation in another, at that stage un contemplated, administrative process (before the Water Tribunal but not mentioned in the notice) which could only conceivably arise after the process before the responsible authority had been completed and, for present purposes, if the decision of the responsible authority went against the objector.

43 And to add to the eccentricity of the scheme suggested by counsel for the respondents: if an objector excluded by the nature of the notice she received from enjoying a right of appeal to the Water Tribunal, was aggrieved by the failure of the responsible authority to direct publication which included a specified time for objection under s 41 (4)(a)(ii) and wanted to achieve a right of appeal in case she lost before the responsible authority, the remedy of such an objector, on counsels' submission, would be to review the decision of the responsible authority not to direct such publication. This means that, on the respondents' argument, an objector preparing to attack the license application, who ex hypothesi had suffered no prejudice in relation to the administrative process before the responsible authority as a result of the s 41(4)(a)(ii) failure,[11] would, on pain of falling potentially foul of s 7(1) of PAJA,[12] have to launch a review to generate her potential appeal rights even in some instances before the parties to the dispute raised by the license application and the objection(s) had come to grips with the issues at first instance.

44 As I have demonstrated, the action of requiring publication under s 41 (4)(a)(ii) is merely one of an undefined range of methods

available to a responsible authority to bring the fact of a license application to the notice of potentially affected persons. Although one may with a measure of confidence say that notice through the media will reasonably be directed by a responsible authority, acting correctly, where the license applied for gives rise to serious issues which affect a substantial body of persons, this will by no means be the only appropriate notice method for such a case. Particularly where the license application affects poorly educated or illiterate rural people without significant access to the media, notice through the media might be quite valueless. Why then privilege, for purposes of a potential appeal, the intended beneficiaries of notice through the media over classes of interested persons who receive notice in another way? None comes to mind. So one may legitimately characterise the narrow construction as arbitrary.

45 All this leads me to conclude that the construction favoured by the Water Tribunal gives rise to absurdities as that term is used in *Venter v Rex* 1907 TS 910 and cases which have approved it.[13] But, as counsel for the appellants pointed out, I did not need to go that far. It is sufficient for present purposes if I am able to find that the construction proposed by the appellants is one which might reasonably be applied to the measure and which better promotes the spirit, purport and objects of the Bill of Rights.

46 It is no doubt correct, as counsel for the respondents submitted, that the appellants do not have a constitutional right to an internal remedy such as an appeal process from a decision of a responsible authority. But that is not the question which arises in the present cases. The question which does arise is why the Legislature, having created such an internal remedy, would have sought to exclude interested persons such as the appellants from its ambit.

47 The answer proposed by counsel for the respondents is that the interests of persons such as the appellants are adequately protected

by their right to participate in the process before the responsible authority and their right of review. No doubt. But this answer begs the question. The rights of s 41 (4)(a)(ii) objectors are equally well protected by review rights. Why then create an appeal right for them?

48 The legislative scheme I have described emphasises that participation is an essential tool to ensure that decisions that may significantly affect the environment are scrutinised and made from an informed point of view. This decision making process both advances the constitutional values of openness and inclusivity and is advanced by providing platforms for those affected to air their views[14]. The Water Tribunal is a specialist body. Under s 146(4) of the NWA its members must have “knowledge in law, engineering, water resource management or related fields of knowledge”.

49 An appeal is a rehearing. An appellate body, properly so called, examines the decision of the institution below it to determine

whether the decision to it was right or wrong. No rational purpose comes to mind for denying the Water Tribunal the input of the classes of objectors I have identified. There is moreover a fundamental difference between an appeal and review. As was said in *Sidumo and Another v Rustenburg Platinum Mines and Others*[15]

... there may well be a fine line between a review and an appeal, in particular, where ... the reviewing court considers the reasons given by a tribunal, not to determine whether the result is correct, but to determine whether a gross irregularity occurred in the proceedings. At times it may be difficult to draw the line. There is, however, a clear line. And this line must be maintained.

50 Leaving aside the class of objectors whose motives are purely obstructive, that objectors participated in the process not because notice to was given them but because of their own vigilance is an indication that their concerns about the license application might well be legitimate. That they entered the process at the level of the responsible authority through their own vigilance is hardly a rational ground for a legislative denial of a right to participate at the next level, ie that of the Water Tribunal. After all, as was held in *Koyabe and Others v Minister for Home Affairs and Others*[16]

Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

51 The Koyabe court quoted with approval[17] from Hoexter, *Administrative Law in South Africa*, 2nd ed 63:

Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons

that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a calmer, more objective and reflective judgment' in reconsidering the issue.

52 Counsel for the respondents argue that the restriction of those with appeal rights within the context of s 148(1)(f) to persons who have lodged written, as opposed to oral, objections would be equally offensive to constitutional values. Why, they ask, would the measure discriminate against those who did not put their objections in writing?

I think the answer has to do with good record keeping. Most South Africans know that when you interact with officialdom, you usually

have to fill in a form. It may be that to have broadened the range of those entitled to appeal to all persons who participated in the initial decision making process would have been more constitutionally appropriate but the restriction to those who have come on record is rational.

53 I turn to consider the three grounds upon which counsel for the respondents seek to justify the restriction for which they contend. The first is that a general right of appeal would overburden the system. I think that this submission is at best speculative. We

have nothing before us to suggest that the system as it presently operates is overburdened. I have pointed out that the Water Tribunal

need not sit en banc. Under s 147(1), a matter can be heard by a single member of the Water Tribunal. The solution to the work load argument is to be found in s 146(3) of the NWA: if more members are necessary to deal with the case load, the Minister can appoint them. There is no statutory restriction on the number of members of the Water Tribunal.

54 Secondly, the appellants point to the provisions of s 148(2)(b) which suspends the decision to grant a license. But the measure contains a remedy for that concern: the Minister may direct that the appeal should not suspend the operation of the license, much as a high court may direct that its order not be suspended pending appeal.

55 Thirdly, the respondents counsel argue that the restriction for which they contend is rendered rational because the s 41(4) regime is designed for matters which are serious and of broad impact, while the s 41 (2)(c) regime is directed at matters which are less serious and of narrower impact. I have touched upon this consideration in paragraph 44. Although the argument has weight, I do not think it can carry the day in the light of the other considerations I have discussed.

56 I have touched above on the contention that the restrictive interpretation of s 148(1)(f) accords with a discernable legislative scheme to curtail the classes of litigants who enjoy a right of appeal to the Water Tribunal. It is quite right, as counsel for the respondents argue, that it is not for this court to substitute its own sense of appropriateness and proportion for that of the Legislature or to second-guess the policy choice of that organ.

57 But, in interpreting the measure, we must bear in mind the legislative context in which those very policy choices were made. The policy which I identify is a desire, within broad limits, to provide for appeals to the Water Tribunal by persons interested in or affected by decisions made by functionaries in the exercise of the powers conferred upon them by the NWA. The legislative choice was to identify each of the decisions in respect of which a right of appeal was conferred and, in the main, those who would be entitled in each of those instances to appeal. The reasons for some of the potential exclusions under categories of potential appellants in situations other than that contemplated by s 148(1)(f) may well be problematical. For example, one wonders why a right of appeal is conferred in some instances on interested and in others on affected persons. In one instance - s 148(1)(m) - there is no identification at all of the class entitled to appeal. In the case of a directive issued by a catchment agency - s 148(1)(a) - only the recipient of the directive has a right of appeal.

58 There may, or there may not, be rationality in each of the other situations contemplated under s 148(1). We are not called upon to deal with them. We are called upon to interpret s 148(1)(f) in the light of the considerations with which I have dealt. There is no clear policy manifested to exclude from the ambit of s 148(1) as a whole any particular class of potential appellants. And any absence of rationality in other situations within s 148(1) which may or may not exist would not help in the task of interpreting s 148(1)(f).

59 In my view, the construction of s 148(1)(f) of the NWA proposed by the appellants would advance the constitutional value of open, broad participation by those affected by administrative processes while the construction proposed by the respondents would retard it.

60 All this leads inevitably to the conclusion that the appellants prospects of success are very strong indeed. Had the case been untrammelled by the condonation questions, with which I shall now deal, the appeals would at this point in the judgment have been upheld.

61 The appellants are non-governmental organisations. Their funds are limited. Particularly in the case of the second appellant, their members include those previously disadvantaged by inadequate access to educational and economic resources. Their attorney is a public interest litigator. I mention this not because there is one law for the appellants and their attorney and another for other, perhaps more affluent, litigants and their legal representatives but because in evaluating the case for condonation, I bear in mind the relatively disadvantaged position in which the former have to conduct the litigation.

62 The root cause of the appellants' problems was their struggle with the transcriber employed by the appellants' attorney to produce the record.[18] Despite the attorney's best efforts, it took nearly eight months for the record to be produced. And then the record contained mistakes which had to be corrected. The transcriber was paid in advance for its work. The respondents suggested that the attorney should have used another contractor when the problems manifested themselves. Alas, the predicament of the appellant's attorney is all too familiar in this Division. There was no prospect that another transcriber would have done a better job. And the attorney had already paid for the work. She, or the appellants, could hardly have been expected to find

more money for a new transcriber and then try to recover the money paid from the original contractor.

63 The delays have, except for one period of six weeks all been explained. The explanations for some of the periods were weak indeed. The unexplained inaction for the period of six weeks is indeed a serious breach of the Rules and departure from the standards expected by the courts of their practitioners. But I think one must bear in mind, as anyone who has been in practice will recall, the feelings of demoralisation and powerlessness which overtake a practitioner, particularly a busy practitioner, when confronted with the apparently insoluble problem of someone within the present context who will just not do his work, even though you have paid or promised to pay him to do so.

64 Although the respondents dealt extensively both by affidavit and argument with the condonation aspect, they do not make the case that they actually believed, when the record was not timeously lodged and the appeal lapsed, that the appellants had given up the struggle to bring their cases before this court. Nor did the respondents in anyway alter their positions to their detriment as a result of the delays. The court has not been inconvenienced. The ponderous, unwieldy and largely unnecessary record was placed before us in enough time for us to prepare for the appeal.

65 A factor which weighs heavily with me is the nature of the case and its importance within the context of the interests of justice. It concerns access to justice. It is of the utmost importance that litigants to whom the law provides access to a tribunal are not deprived of their rights in this regard. This is, as far as we have been able to establish, the first time the present issue has been considered by a court of law. The matter has been fully argued by skilled and diligent counsel on behalf of all the private sector litigants.[19]

66 Taking all these considerations into account, I think it is right to grant condonation.

67 Some aspects of the condonation question were not specifically raised in the papers which the appellants delivered in support of their condonation application. In each of these aspects, the facts upon which the appellants relied for condonation appeared from their affidavits in their substantive application. The term “application” is not defined in the Rules. It is open to a court to entertain, in a proper case, an application for condonation made orally from the bar. This is such a case.

68 In another instance, the notice of appeal to this court was served on the 21st day after the appellants had obtained the decision of the Water Tribunal in which they were non-suited. But the notice of appeal was lodged with this court one day late. This infraction caused no prejudice. It, too, is condoned.

69 In the result, it is unnecessary to consider the reviews and they fall away. I turn to the question of costs.

70 In my view, this is a proper case for the application of the Biowatch[20] principle. The parties respectively attack and defend a decision of an organ of state. Costs were not sought against the organ of state in question. The principle is that private parties in such a case should not be mulcted in costs, including those arising from interlocutory applications in the course of the litigation, unless their conduct has been frivolous, vexatious or otherwise

inappropriate. None of those exceptions is presently applicable.

71 In the result, the following orders are made:

1 All the appellants' departures from the provisions of the Rules are condoned and the appeals are, to the extent necessary,

reinstated;

2 No order is made on the application for consolidation;

3 The appeals in case nos A665/11, A666/11 and A667/11 are all upheld. The decision of the Water Tribunal in each case is set aside

and substituted with the following:

it is declared that the appellants have standing to pursue their appeal before the Water Tribunal;

4 No order is made on the reviews before this court.

5 The deed of settlement in case no. A667/11 concluded between the appellants and Exxaro Coal (Pty) Limited is made an order of court;

6 Pursuant to the deed of settlement, Exxaro Coal (Pty) Limited is ordered to pay the appellants' costs on the unopposed scale

as between party and party, including the preparation of the record of proceedings;

7 Save as set out above, no order is made as to costs.

NB Tuchten

Judge of the High Court

18 November 2013

I agree.

M Victor

18 November 2013

For the appellants

Adv P Kennedy SC and Adv M Bishop

Instructed by Legal Resources Centre

Johannesburg

For the second respondent in case nos. A665/11 and 4535/11

Adv A Dodson SC and Adv P Lazarus

Instructed by Routledge Modise Inc

For the second respondent in case nos. A666/11 and 4533/11

Adv MA Wesley

Instructed by Malan Scholes

[1] Rule 7(2) reads: The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.

[2] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation

and Environment, Mpumalanga Province, and Others 2007 6 SA 4 CC para 102

[3] The emphasis in all quotations from statutory measures is my own.

[4] The responsible authority in all the cases before us is the DWA.

[5] Compare Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 5 SA 246 CC footnote 163, quoting with approval from Wade and Forsythe, Administrative Law, (8th ed 2000) att 239.

[5] Compare Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 5 SA 246 CC footnote 163, quoting with approval from Wade and Forsythe, Administrative Law, (8th ed 2000) att 239.

[6] An administrator for the purposes of PAJA.

[7] Bato Star Fishing (pty) ltd 1/ Minister of Environmental Affairs and Others 2004 4 SA 490 CC para 90; South African Police Service v Public Servants Association 2007 3 SA 521 CC paras 17-20; Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd

[2007] ZACC 12; 2007 6 SA 199 CC para 53

[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 SCA para 25

[9] Compare MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited

[2007] ZACC 25; 2008 2 SA 319 CC para 33 where it was held that the word "direct" had different meanings in different sections of the Environmental Conservation Act.

- [10] I deal with these grounds in paras 53 to 55 below.
- [11] Because, on the example given, she knew enough about the process before the responsible authority to enable her to exercise her rights.
- [12] The duty to bring review proceedings without unreasonable delay but in any event within 180 days of becoming aware of the decision not to require such publication and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
- [13] See, eg, Natal Joint Municipal Pension Fund 1/ Endumeni Municipality, *supra*, footnote 35.
- [14] I am paraphrasing the views of Murombo and Valentine, SLAPP suits: An emerging obstacle to public interest environmental litigation in South Africa, (2011) SAJHR82 at 86
- [15] 2008 2 SA 24 CC para 244
- [16] 2010 4 SA 327 CC para 35
- [17] Footnote 35
- [18] This is ironic because very little reference was made to the record as such during argument. But no attempt was made by any party to reach agreement on the curtailment of the record on appeal.
- [19] It is most regrettable that on a matter of such importance to the administration of the NWA, we did not have the benefit of the views of the DWA. It is the constitutional duty of all organs of state to assist the courts to ensure their effectiveness. Sections 41 (1)(h)(ii) and 165(5) of the Constitution. There is thus a duty on every organ of state whose decisions and functions are being considered by a court to appear through counsel and give the court the benefit of its views. This applies not only when the organ of state wishes to defend its actions or its interests or resist the relief sought. A court is also entitled to be told by the organ of state why it does not resist the relief sought or why it does not wish to defend its actions or interests.
- [20] Biowatch Trust v Registrar Genetic Resources ad Others 2009 6 SA 232 CC

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